Case and Comment
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What are Buildings

When Do They Begin and End?

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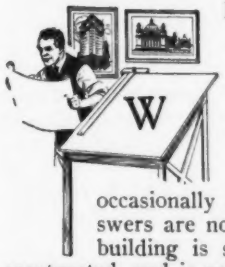


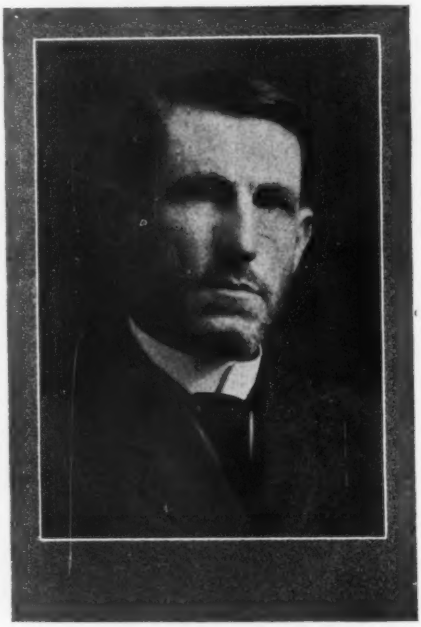
WHAT is a building, and when does the law begin to regard it as such, and when does its technical existence cease? These are questions that occasionally arise, and the answers are not always easy. A building is something built or constructed, and is generally understood to be an edifice erected upon the ground, —either directly or upon a wall or short or tall posts. It must have some connection with the soil. There is no limit to its height above the ground, and probably none to its depth below the surface. It may be a temporary shelter or a permanent abode for human beings or domestic animals, as a dwelling house, barn, stable, hall, or church; or a structure for protection of chattels, as a warehouse or storehouse, or carriage house; or for manufacturing, a public building for office purposes, etc. It may be an erection that is not intended for use at all, but simply a monument or work of art. It may be for any purpose, of any shape, framed or unframed, and constructed of any kind of material. Whether structures are real or personal estate probably has no bearing upon the question of their existence as technical buildings.

In most cases, the answers are easy; but there are many things built that courts have not considered, and in some cases courts disagree with the special circumstances in each case. The instances in which doubts exist involve monuments, statues, fences, walls, dams, structures beneath the surface of the ground, etc. These are certainly erections, and the question as to whether they are buildings in the several phases of the application of the law to them will have to be met.

The mechanics' lien law, which applies to the erection of buildings, probably also has relation to the various kinds of constructions that have a place upon or in the earth and yet have not popularly been thought of as buildings. The matter has importance in a transfer of

real estate where a deed expressly states that the premises include the land and the buildings thereon, and, for want of sufficient connection with the soil, the buildings are not technically real estate. Similar questions arise between landlord and tenant and mortgagor and mortgagee.

Not only is the main part of a structure regarded as the building, but the ells, piazzas, furnaces, machinery, etc., if they are so attached to the building that they are necessarily a part of it. Even if double windows, storm doors, screens, etc., are temporarily at a distance from the building they constitute a part of it as much as when they were actually attached to it.



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Secondly, when do materials become a building? This question is more often difficult to answer than even the first. Is there a particular day, hour, or minute when the character of the materials change into a building, involving new applications of law and procedure? The matter is something more than a theory, and is liable to become practical at any time.

When does the mechanics' lien law first apply, and when do materials pass under a deed which conveys the soil and the "buildings" thereon, or when do they pass as part of the soil without being mentioned in the deed? Must the frame of a structure be actually raised before it becomes a technical building? Apparently not, according to the decisions in mechanics' lien cases, where a lien is allowed for work upon the frame or other part or parts of a building before it has left the shop. There must be some general rule, though its application in instances might seem to be stretched.

Ought the same rule, whatever it is, to apply in cases between vendor and vendee, mortgagor and mortgagee, and landlord and tenant? If so, the vendee or mortgagee might have a right to materials that were not on the premises, and their existence even was unknown to him at the time of making the contract of sale or loan. If the deed or mortgage calls for buildings that are upon the land, probably the title to materials for a building that had already been worked upon for this particular building, but nothing had been done upon the land towards its construction and the materials remained in the shop of the contractor, would not pass. Ought the lien of the mechanic in such a case to attach to the soil itself? It seems proper and just that the rule should be the same in both cases.

The moment the materials change from chattels to real estate, if that time can be discovered, ought to be the time when the mechanics' lien attaches to the soil, and the vendee can claim the articles as if they had been upon the land or attached to it in their final form, position, and condition. To constitute this change there must be an express and positive appropriation of the materials to the construction of the particular building. The character of the labor upon the materials, or uniqueness of design which has been made for the building to be erected, is certainly evidence of the connection of the materials and labor upon them with the proposed building and land.

Coupled with this, of course, must be the mind of the owner who either actually or impliedly, through the medium of the architect or contractor, connects the materials and labor with the building and land. This combination of intentional and actual adaptation of materials and labor to the desired building must be an appropriation sufficient to change materials into a building; and materials subsequently appropriated under the same rule successively undergo the same change.

When a Building Ceases to Be Such.

The third question is practically perhaps clearer and less likely to appear in actual practice. When does a building cease to be such, and become a simple mass of material or *débris,* to which the law of buildings cannot be applied?

Growth and decay are opposites, but are both more or less gradual, and so far are something alike. The law of the mechanic is not likely to be applied in cases of destruction of buildings, but in other instances it is important to determine the question definitely.

General decay or any condition of a building does not change its form and character as a building. The roof may be gone, and the boards may all go, but it is a building still. Its frame may be taken down and piled upon the ground or carried to another lot of land, but the materials still technically constitute a building.

Again, intention comes to the fore and must be considered. When the materials technically became a building, appropriation was the factor that governed the decision. So, at the end of the technical life of a building, restoration to its former condition as materials is the factor in deciding the termination of such an existence. That is, the decision, and action because of that decision, to no longer treat the materials as a part of the particular building, terminate their character as a part of the building; and thereafter they are what they were before the appropriation,—merely chattels.

This intention must be accompanied with some overt act, probably, evidencing the intention; or, at least, there must be no accompanying or subsequent act that is inconsistent with such determination.

Of course in both appropriation and such restoration at the beginning and end of the technical existence of a building, the owner of the soil and materials and those acting authoritatively for him must be the person or persons who make such decision.

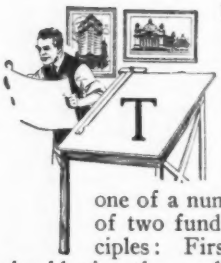
Sidney Perley

Contractors' Bonds as Substitutes for Materialmen's Liens

By HON. HENRY A. ALEXANDER

Of the Atlanta Bar

Author of a Treatise on "The Lien Laws of the Southeastern States"



THE impression that the liens of materialmen are a special and unmerited privilege is a misconception. They are in reality only one of a number of expressions of two fundamental legal principles: First, that the law should give the creditor every possible aid in the collection of his debt short of interference with innocent third parties and the normal course of business; and, second, that in the sale of property, as long as the purchase price remains unpaid, the rights of the vendor are superior to those of the vendee. They stand upon the same basis as the vendor's lien and the attachment of property upon default in payment of purchase price. Where these principles are not enforced, it is not because of the unwillingness of the law, but because of the nature of the thing sold. Property which is consumed in its use cannot be attached for purchase money or subjected to a vendor's lien, not because the vendors have not the right, but because the thing itself cannot be found. It so happens with the materialman that his goods have a permanent form and that he can give notice of his claim to third persons by its registration on the public records, and there is no reason why the principles referred to should not be applied to his case.

But merely to show that the materialman is not a recipient of special favors falls far short of a complete statement of his position. His effective protection tends to promote the permanent improvement of land, and is a vital factor in the development and growth of the community. A materialman's lien constitutes, in proportion to its effectiveness, a basis of credit, both for the owner of real estate, who, though lacking sufficient cash capital, is thus enabled to improve it, and for the contractor, who, though he be without capital, may on the faith of the security afforded them by the law, obtain from materialmen the necessary supplies for the execution of his contract. The direct result is to bring into the business of contracting many persons of character and ability who would otherwise be excluded.

That it is not alone the demands of materialmen that sustain the lien laws is shown by the fact that many of them hold the view that their business could be conducted upon a far more satisfactory basis if there were none at all, thus compelling them to look solely to the personal credit of the contractor in extending credit. This, however, would be unfortunate for the public in throwing the business of contracting into the hands of the limited number of those contractors with capital and resources who could satisfy materialmen that their accounts would be duly paid, thereby eliminating from the business thousands of competent and honest men,—a condition which would tend directly to increase the cost of building. It is these considerations, in the writer's opinion, which, in the face of the feeling that they are a special and arbitrary privilege, have kept the lien laws upon the statute books of every state in the Union.

It is true, however, that the nature of the subject is such as to make it exceedingly difficult, if not practically impossible, to formulate a lien law that will

be at once just, effective, and practicable. Under those now existing, the factors entering into the liens of materialmen furnishing supplies through contractors are so numerous and complicated that successful establishment is the exception. It is probably true that only a minor proportion of those claimed and filed could withstand a thorough contest. The greater part of such efficacy as they have grows out of the fact that when entered on the court records they constitute a cloud upon title and a possible source of danger to subsequent purchasers or mortgagees, thereby, through their unwillingness to take chances, causing attorneys, in the examination of titles, though doubting the validity of the lien, to require its cancelation and removal.

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The drafting of a just and effective lien law is a task beset with problems, most of which permit of solution only by a choice of difficulties. Among the lesser is the determination of how far the privilege of the lien should extend along the chain of contractors between the principal contractor and the subcontractors and materialmen under him. Another is, whether the lien should be retroactive and relate back to the date of the beginning of work or the furnishing of material, or take effect only from its filing and entry on the public records. Another is the proper rule of priority between the lien and a prior mortgage as to the improvements themselves for which the lien is claimed. Another arises when the contractor fails to complete his contract, with part of the contract price still remaining in the hands of the owner, leaving materialmen's liens unpaid which were recorded prior to his default. The question then is, Shall the owner be allowed to take this balance to complete the contract, or must he apply it to the payment of the recorded liens? Another is the proper method of fixing the amount of the lien when the contract price is found to be insufficient to discharge all—whether by the amount due the contractor by the owner at the time of the service of notice by the materialmen, or, after completion of the work, by a marshaling of the liens and an apportionment of the balance of the contract price among them. But the fundamental difficulty is this: In its ultimate analysis, every lien law is in effect a garnishment or impounding of the contract price in the hands of the owner in order to apply it to the claims of those from whom the principal contractor has procured the labor and material entering into his work. In most of the states, this garnishment or impounding is effected by a written notice to the owner, served upon him by the materialman or subcontractor a short period after the completion of their work, and thereupon a lien for their account arises in their favor, limited by the sum owing by the owner to the principal contractor at the time of the receipt of the notice. In other states, the garnishment or impounding is effected by mere operation of law, the statute making it the duty of the owner, without notice from the materialmen or subcontractors, to retain a sufficient sum to

pay their accounts. The underlying weakness of both of these systems is that, to an indeterminate extent, they seek to require the owner to retain in his possession for the benefit of subcontractors and materialmen funds which, by the terms of his contract, or by the practical necessities of the case in order to prevent the stopping of work, he is compelled, from time to time, to pay out to the contractor. In those cases where the contractor is honest or solvent and the cost of the work does not exceed the contract price, the results may be satisfactory. But where the contractor is dishonest or insolvent, or the cost of the work exceeds the contract price, or there is collusion, either between the owner and the contractor against the materialman, or between the contractor and the materialman against the owner, these laws can afford but very little protection. Herein lies the inherent defect of all lien laws,—a defect which the writer is inclined to think cannot be overcome. On account of these various difficulties, all legislation on this subject has been simply a swinging back and forth of the pendulum between alternate evils,—between laws that seem to favor unduly the materialmen and those that seem to favor unduly the owner. It is no surprise, therefore, to find, for example, that while, in the state of Georgia, an attachment law enacted in 1799 has served all needs for more than 115 years with not over half a dozen amendments, there have been no less than forty-nine acts relating to the protection of materialman. The same is true in greater or less degree in practically every other state. In Kentucky, there have not been less than seventy-seven attempts to enact a satisfactory materialmen's lien law.

Conceding that the securing of materialmen affects to a large degree the general welfare, and that the theory on which all modern lien laws are based—the impounding of the contract price in the hands of the owner—is largely impracticable, it becomes an important consideration to find a substitute.

Toward the accomplishment of this end, certain legislation of the state and Federal governments during the last twenty years, and the practice of the bonding companies of the country, offer valuable suggestions.

In 1894, the Federal government enacted a law requiring persons contracting with the government for public work to incorporate in their bond, conditioned for the faithful performance of their contract, an additional obligation that he would make prompt payment to all persons furnishing labor and material in the execution of the contract, and giving them a direct right of action on the bond. The considerations underlying this legislation were doubtless, first, the providing of a substitute for the ordinary lien, which does not exist against public property; and, second, to avoid the moral wrong of the government taking the supplies and labor of subcontractors and materialmen when their claims had not been settled by the principal contractor. That legislation has proven a marked success, and its results have been excellent in every way. In 1905, the original act was amended, defining more clearly the rights of the respective parties under the bond and the proper procedure to enforce them. In 1899, the state of Tennessee enacted a similar statute, with the additional provision that the failure of the public officer in charge of the work to exact such a bond should constitute a misdemeanor. In 1910, the legislature of Georgia passed a similar bill, introduced by the writer, who was then a member. In its final form, there was no provision for criminal liability for default in exacting the bond, which was left to stand upon the basis of ministerial duty. In 1903, a like act was passed in the state of Oregon.

In 1894, the legislature of the state of Louisiana enacted a law which carries the idea one step further. By it, the private builder was required, upon the penalty of subjecting himself to a direct personal liability to materialmen and subcontractors, to exact from the principal contractor a bond with approved security, conditioned to promptly pay the bills of laborers and materialmen, who were given a direct right of action on the bond. The far-reaching significance of this act lay in the fact that it applied the idea embodied in the Federal act of 1894 to the owners of private property. It was

operative only in cities having more than 50,000 inhabitants, which confined it to the city of New Orleans. In 1896, it was amended to include cities having more than 10,000 inhabitants. In 1906 and in 1908, its scope was further enlarged; and by the act of 1912, its operation was made general throughout the state, the only limitation being that the contract should exceed $1,000. When it is remembered that the life of the average lien law is not more than four or five years, the comparatively long period that this system of securing materialmen has continued and its gradual extension seem strong evidence of its satisfactory working. Moreover, the testimony of materialmen, bonding companies, and attorneys in Louisiana is that it has proven a distinct success.

In considering whether the Louisiana statute offers a solution of this vexed problem, an important circumstance to be noted is that the bond required is to a great extent the same that the surety companies of the country have been writing for contractors in favor of private builders for a number of years, and with generally satisfactory results. This latter bond, on which a premium of 1-2 of 1 per cent of the contract price is charged, is conditioned for the performance by the contractor of his contract, and the delivery of the structure erected by him free from all liens. In most states, it has been decided that this bond, being a contract between the owner and the contractor, subcontractors and materialmen not being parties thereto, have no right of action upon it. In other states, a contrary rule prevails. In the latter, the practical effect of this bond, when given, is that of the Louisiana statute. In giving to subcontractors and materialmen a right of action on the bond, the Louisiana statute seems but a natural evolution, and effectuates the real intent and spirit of the voluntary bonds. It is significant that in Louisiana all the bonding companies in the United States are writing these statutory bonds for the same premium as the voluntary bond when the penalty of the bond is less than or equal to one half the contract price, that is, for ½ of 1 per cent on the whole contract price. Where the penalty of the bond exceeds one half of the whole contract price, the premium is 1 per cent of the penalty of the bond, and where the penalty of the bond is greater than the contract price, the premium is 1 per cent of the contract price.

In its practical operation, the premium of the bonding company is doubtless added by the contractor to the cost of the building, and is thus finally paid by the owner. It seems reasonable to expect that its effect elsewhere would be, as in Louisiana, to introduce a high degree of safety and certainty into building operations. Whatever disposition it would create on the part of materialmen to be careless as to the contractor to whom they sold would be more than counterbalanced by the disposition of bonding companies and others who should undertake to become sureties to scrutinize the character and competence of the contractor. It would also be reasonable to expect that, with the practical certainty of payment, there would come a tendency to lower the price of building supplies. If the effect of such legislation would be to secure all of these important benefits at the cost only of a premium of not exceeding 1 per cent on the cost of building, it would seem to be well entitled to the careful consideration of other states.

Henry A. Alexander.

Conditions for Hearing in Court Rooms

BY JACOB MAZER

Acoustical Engineer

AN air of uneasiness pervaded the crowded court room. The face of the judge wore an annoyed expression; the prosecuting attorney fidgeted and shifted; while the array of legal luminaries seated around the counsel table leaned forward with strained countenances. It was a dramatic moment in the chamber of justice, for the star witness for the commonwealth was giving some thrilling testimony in one of the most puzzling murder cases the country ever tried to solve.

"What did you say?—Repeat that; we didn't hear you," the prosecuting attorney said to the witness.

"Speak louder," enjoined the court.

The witness raised his voice, but still those in the court room could not hear him distinctly. At last the jurymen, in despair, were forced to leave their box and gather close to the witness.

Now all this trouble was not the fault of the latter, who had a clear, strong voice—but was due solely to the court room itself. It was simply a case of bad acoustics. There are scores of such cases in court rooms throughout the United States. I continually receive letters from attorneys and judges complaining of the difficulty in trying cases in their court rooms, due to bad conditions for hearing. The following from a letter recently written by a well-known circuit judge of the state of Michigan is typical:

"In this court room neither court, counsel, nor jurors are able to hear in an understanding way; nearly all of the evidence or arguments, and errors of various sorts,—wrong rulings, wrong verdicts, and retrials,—occur by reason of it; furthermore, to strain constantly the hearing faculties to their utmost, as is now necessary to try any sort of cases in the room in question, is as injurious to those organs as is a like strain to the eye or any other organ of the body. It is also exceedingly irritating to all concerned, and tends seriously to destroy that calm poise and keenness of thought so essential to a fair and equal administration of justice." Speaking further of the proposed

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correction of the room, he says: "I believe it will prove a marked economy in money, to say nothing of the profound satisfaction that must result to court, jurors, and suitors, alike."

Defective Acoustics Remediable.

Until a few years ago, it was thought the evils of defective acoustics had to be tolerated and the best made of a bad situation. In the mind of the general public and also among many architects, the opinion still prevails that the acoustical quality of an auditorium is largely a matter of chance, and must always remain so. A like opinion exists in regard to the possibility of regulation of acoustical conditions by planning in advance of construction. The purpose of this article is to combat these erroneous impressions.

The correction of defective acoustics and regulation in advance of construction has been reduced to practice, and is a purely scientific matter with its basis in mathematics. There is no uncertainty about it as to methods or results; mathematical certainty accompanies every step to the result. This does not mean that all there is to know about acoustics has been learned, but that the solution of the problem has advanced far enough to make it possible to correct a defective room or plan, and specify in advance for a new room, so that every auditor may hear clearly and distinctly, and without the discomfort of annoying reverberation.

Bad Acoustics Due to Reverberation.

Bad acoustics are chiefly due to excessive reverberation and echoes, caused by the sound waves continuing in the room for several seconds after the source of sound has ceased. Reverberation is closely related to the generally known phenomenon of echo. An echo of any sound is caused by the reflection of the sound at some suitable surface, such as the face of a cliff, a mountain side, or as in a room at the walls and ceiling. The reflection may even take place, as in the case of thunder, at the surface of a current of hot or cold air. To be heard as an echo the reflection of a sound must reach the ear at least one tenth of a second after the initial sound has left the ear. This is because of the physiological fact that the sensation of hearing a sound continues for about a tenth of a second after the sound wave has ceased to act upon the ear. When a sound is reflected from a number of different surfaces, a number of different echoes of the same sound may be heard, and if these follow one another at very short intervals they have the effect of prolonging a short loud sound into a long roll or rumble. The roll of thunder is due to multiple reflection. In nearly all large auditoriums this phenomenon of a multitude of echoes is very prominent. The reflections follow one another so rapidly and immediately after the initial sound, that the ear cannot distinguish them as separate sound, and we hear them as a prolonged or continuous sound, which we call reverberation. In large court rooms, we often hear one or more echoes for some sounds in addition to the reverberation, for the reverberation varies with the pitch and intensity of the sound that produces it.

The study of the acoustics of auditoriums includes varied phenomena such as refraction, diffraction, reflection, absorption, interference, reasonance, and transmission. As the difficulty in most auditoriums is due mainly to an improper amount of reverberation, the problem of correcting bad acoustics and regulation in advance is confined chiefly to a study of the phenomena of reflection and absorption in their relation to the reverberation of an auditorium.

However, there are notable exceptions to the common fault. One of these exceptions was the House of Commons Chamber in the Dominion Parliament Building at Ottawa, Canada, which I was called upon to correct by the Canadian government. This room was very close to the time of reverberation it should properly have, but, due to the improper position of the absorbing and reflecting surfaces in the chamber, the distribution of the sound was very poor. The surfaces near the speakers absorbed the sound in place of deflecting it to the audience. The distant walls were highly reflecting and acted to return the sound

that reached them after a long period of time had elapsed. By reversing the nature of the surfaces mentioned, namely, increasing the reflecting power of the walls near the speakers and greatly decreasing the reflecting power of the walls distant from the speakers, in the main body of the chamber, the room was rendered excellent in its conditions for hearing, without in any way marring the beauty or general appearance of the room.

For the listener to hear distinctly, each syllable of the speaker must disappear almost entirely before the arrival of the next syllable. When the reverberation, which is due to the reflecting power of the walls, ceiling, and other surfaces in a room, continues too long, it produces confusion and indistinctness. A room may also be defective on account of an insufficient amount of reverberation, for some reverberation is essential to the production of sufficient volume. With too little reverberation, the sound disappears almost immediately after leaving the speaker, and is so feeble that only those close to him can hear it. Therefore it is necessary to good acoustics to produce a condition that will give neither too much nor too little reverberation. In the average acoustically bad auditorium, the reverberation usually continues to be heard for periods varying from four to seven seconds. As the average speaker utters about four syllables per second, there is much overlapping of sounds and consequent confusion in hearing in such rooms. The obvious remedy for this condition of excessive reverberation is to cut down the time of reverberation, and that is exactly what is done in correcting a room having this defect. The time to which the reverberation should be reduced is very important; it differs for different auditoriums, and must be exact to within a few hundreds of a second for good results.

A sound is heard because the wave motion set up by the source of sound in the surrounding air travels from the source to the ear, through the intervening air, and, by its incidence on the drum of the ear, produces the sensation of hearing. Sound travels by this wave motion at the rate of about 1,120 feet per second. It does not travel from the source like a bullet from a gun, but spreads from the source in all directions, and similar to the wave produced by dropping a stone in still water. This spherical wave continues to get larger and larger as the distance from the source increases, until it strikes the walls and other surfaces in the room. Then it is deflected from the surfaces which it strikes at angles, which are equal to the angles with which it met the surfaces.

In an auditorium this reflection of sound is multiplied and continues from surface to surface just as a billiard ball is deflected from cushion to cushion until all of the energy is consumed, mainly by heating the walls and surfaces, which are struck by the sound wave.

Every square foot of surface in a room, whether it be plaster, wood, stone, glass, carpet, or audience, absorbs a small amount of sound each time there is an impact of the sound wave, and reflects the balance of it. These impacts are very frequent even in large auditoriums. In smaller auditoriums they are often as high as 700 per second, depending of course upon the shape and volume of the room. By use of the known quantities, such as the dimensions of a room, and the amount of sound that is consumed every time the sound wave strikes 1 square foot of plaster, 1 square foot of wood, or of any other material in the room (which we do know in exact figures or can find out by testing when we do not know), it is possible to compute the time any particular sound will continue in a room after its source has been discontinued. We can check this computation in a building already erected by actually measuring the time the reverberation will continue in a room.

Whispering Galleries.

Certain phenomena, due to the concentration of sound, in spots are of somewhat common occurrence, and have often been mistaken as indications of good acoustics. Such rooms are known as whispering galleries, because a whisper or other faint sound produced at some particular point is heard distinctly at

some distant part of the building. This is due to one of two causes: First, the walls of the room may be either elliptical or circular in form, and hence act like concave mirrors in converging all of the sound waves to one point; or secondly, the sound may be reflected repeatedly from point to point, and thus be made to travel around the walls. This is the case with long circular passage ways, which are somewhat like speaking tubes.

Old Hall of House of Representatives.

A few years ago in Washington while engaged in the examination of the present hall of the House of Representatives for the government, with a view to improving its acoustical properties, I found some most interesting congressional reports on experiments conducted in the old hall of the House, now Statuary Hall, for the purpose of correcting its acoustical defects. These reports show the old hall of the House of Representatives has been the subject of repeated investigations and reports by some of the most eminent architects and authorities on acoustics in this country, and date from 1820 to 1865. In 1820, in the Sixteenth Congress, that body passed a resolution instructing the committee on public buildings "to inquire into the practicability of making such alterations in the present structure of the hall of the House of Representatives as shall better adapt it to the purposes of a deliberative assembly." Charles Bulfinch, a famous architect, was engaged to make this investigation, and his report shows he was more than ordinarily familiar with the principles that make for good acoustics. His recommendation called for an expenditure of $5,000, but Congress could not spare the amount necessary, according to the architect's estimate. It was shortly after the War of 1812, and money was scarce in the young Republic, just recuperating from the ravages on its commerce.

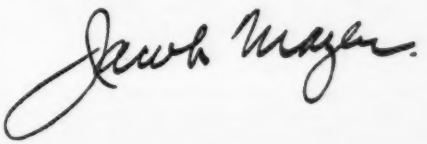
Seven years later, in 1827, a committee of the House of which Henry Clay was chairman made a report on the acoustics to Speaker John W. Taylor in which William Strickland, of Philadelphia, architect and engineer, gave it as his opinion that caissons or panels should be placed in the ceiling, and absorbing material was placed in the dome. These were good ideas, according to modern acoustical experts, and show that the early American architects were conversant with the most advanced acoustic science of their day.

In 1830 draperies were suspended in front of the galleries between the columns of the peristyle, and carpets laid to cut down the reverberation. While these were not sufficient to improve the room except to a small extent, the principle is correct.

Grecian Auditoriums.

History repeats itself. Modern acoustical engineers can learn much from those wonderful people, the Greeks of the Periclean age. As far as we know their amphitheaters were without exception in their acoustical properties; and some of them were so large as to seat 30,000 persons. All were of the same type; open to the skies and with seats arranged in semi-circular rows, one above the other. There were, of course, closed temples in ancient Greece, but these were solely sanctuaries of piety and art. Their temples were not auditoriums such as modern churches are, and had no seats for worshipers. The Greeks had intense love for outdoor life, and in their open-air theaters, protected by canvas overhead in inclement weather, great audiences listened to some of the world's most famous orators.

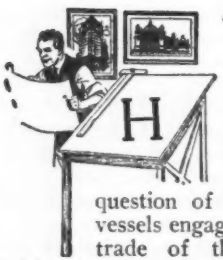
In such an auditorium Demosthenes spoke, Draco gave his laws to the Athenians from the platform of the Greek auditorium, and from it Solon introduced his Constitution and delivered his famous orations. It was in one of these remarkable auditoriums that Aristides and Themistocles stirred the Athenians to their wonderful achievements during the Persian Wars.



The Panama Canal Toll and the Constitution

BY HON. RUSSELL L. DUNN

Of the San Francisco Bar



HAS Congress power to impose toll on commerce of our states passing through the Panama Canal? This question is broader than the question of toll exemption of vessels engaged in the coastwise trade of the United States which is under discussion by Congress following the request of President Wilson to repeal the toll-exemption clause of the act of August 24, 1912, providing for the opening and operation of the Panama Canal, commonly known as the Panama Canal act. The power to exempt vessels using the Panama Canal from toll, our vessels or any other nation's vessels, implies the power to levy tolls. It is the existence of this power in Congress to which the broad question of constitutionality runs.

By article 2 of the Convention between the United States and the Republic of Panama [33 Stat. at L. 2234] the latter nation

"grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water . . . of the width of 10 miles . . . the said zone beginning in the Caribbean Sea three marine miles from mean low-water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of 3 marine miles from mean low-water mark. . . ."

Article 3 of the Convention is a definition by the Republic of Panama of the nature of its grant. It declares:

"The Republic of Panama grants to the United States all the rights, power, and authority within the zone mentioned and described in article 2 of this agreement . . . which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority."

Article 24 of the Convention declares that:

"If the Republic of Panama shall hereafter enter as a constituent into any other government or into any union or confederation of states, so as to merge her sovereignty or independence in such government, union, or confederation, the rights of the United States under this convention shall not be in any respect lessened or impaired."

It would seem quite clear that the grant by the Republic of Panama of the "Canal Zone," as it is known, is a complete cession of soil and jurisdiction, and that the United States hold the territory as much an integral part of themselves as the Louisiana Purchase. The form of words used in executing the cession permits the people of the Republic of Panama to consider it, saving face between themselves, as a perpetual lease salved by an annuity of $250,000, which they may call tribute or rent, paid the Republic of Panama by the United States. Actually the $250,000 annuity is neither tribute nor rent any more than the $250 monthly which the United States pays the Sultan of Sulu is tribute or rent for our occupation of the Sulu Islands, which, it may be explained, are one of the groups comprised within the Philippines.

The Panama Canal Zone is United States territory in all respects. Congress could erect it into a sovereign state of the Union, or through cession of its jurisdiction make it part of any one of our present states, or, as it has done, provide for its direct government under itself.

By virtue of article 9 of the Convention with the Republic of Panama,

"the ports at either entrance of the canal and the waters thereof, . . . the towns of Panama and Colon, shall be free for all time so that there shall not be imposed or collected customhouse tolls, tonnage, anchorage, lighthouse, wharf, pilot, or quarantine dues or any other charges or taxes of any kind, upon any vessel using or passing through the canal . . . or upon the cargo, officers, crew, or passengers of any such vessels, except such tolls and charges as may be imposed by the United States for the use of the canal and other works . . ."

Because of the canal ports and waters being free under this provision of the Convention, Congress provided by the act of March 2, 1905 [33 Stat. at L. 843, chap. 1311, U. S. Comp. Stat. Supp. 1911, p. 740]:

"That all laws affecting imports of . . . merchandise and entry of persons into the United States from foreign countries shall apply to . . . merchandise and persons coming from the Canal Zone . . . into any state or territory of the United States or the District of Columbia."

The power which Congress has to lay and collect taxes, duties, imports, and excises, which shall be uniform throughout the United States, under § 8, Article I. of the Constitution, is subject to prohibitions set forth in section 9 of the same Article, as follows:

"5. No tax or duty shall be laid on any articles exported from any state. No preference shall be given by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another."

Since the canal ports and the canal waters are free by virtue of the Convention with the Republic of Panama, it is obvious that the third prohibition is not invaded by the levying and collection by the United States of tolls or charges "for the use of the canal." Vessels are not required to enter, clear, or pay duties in the Canal Zone. So far as the commerce of our states is concerned, § 5 of the Panama Canal act [37 Stat. at L. 563, chap. 390] reads:

"That the President is hereby authorized to prescribe and from time to time change the tolls that shall be levied by the government of the United States for the use of the Panama Canal. . . ."

And it is clear that the President may prescribe that the payment of the tolls shall be made at the customhouse of the port of entry, or of the port of clearance, of the vessel in our states. It is not necessary to assume that the ship engaged in our states' commerce must carry with it the price to be paid to a Panama Canal tollgate keeper before the ship would be permitted to pass.

Considering a Panama Canal toll to be levied on our states' commerce, as it is in fact levied on the foreign part of that commerce, to the extent of $1.20 per net registered ton of the ship capacity, by the President's proclamation, let us take a concrete example of the effect of that toll on the commerce of ports of different states, one passing through the canal, the other not passing through, with the same foreign port. Let us take commerce between New York and Acapulco, on the west coast of Mexico, using the canal, and commerce between Seattle, in the state of Washington and Acapulco, which would not use the canal. It is obvious that vessels conducting that commerce through the port of New York, using the canal, would pay at the customhouse in New York $1.20 per net registered ton going and coming, whereas vessels conducting that commerce through the port of Seattle would pay nothing at the custom house in Seattle. This seems clearly to be a preference given to ports of the state of Washington, over ports of the state of New York, by either a regulation of commerce of which the toll would have to be regarded as an incident, or by a regulation of revenue, the toll being revenue, and, as either, prohibited by the clause of the constitution quoted above.

The Supreme Court seems never to have been called on for an affirmative rule on this prohibition. It has been suggested to the court as in point in several cases, but the court has always said, ruling negatively, either that the preference was not given as counsel thought, or that the preference which appeared to be given was merely incidental to the proper exercise of some other power of Congress than the taxing power.

Probably what are known as the Head Money Cases (Edye v. Robertson), 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247, leading, indicate the view of the court.

This case arose out of the act of Congress of August 3, 1882, to regulate immigration, which imposed on the owners of steam or sailing vessels who shall bring passengers from a foreign port into a port of the United States, a duty of 50 cents for each passenger not a citizen of this country. The court held that it is a valid exercise of the power to regulate commerce with foreign nations.

Justice Miller, who delivered the opinion, said:

"It is said that the statute violates the rule of uniformity and the provision of the Constitution, that 'no preference shall be given by any regulation of commerce or revenue to ports of one state over those of another,' because it does not apply to passengers arriving in this country by railroad or other inland mode of conveyance. But the law applies to all *ports* alike, and evidently gives no preference to one over another, but is uniform in its operation in all ports of the United States. . . . But the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the shipowner by this statute is the mere incident of the regulation of commerce,—of that branch of foreign commerce which is involved in immigration."

Let us next examine our concrete example of application of a Panama Canal toll, not from the standpoint of the vessel against the master of which the toll is levied directly and collected, but from the standpoint of the merchandise—the merchandise exported from our states—against the owner of which the toll is indirectly levied and from whom it is ultimately collected by the master of the vessel by his adding of it to his freight charge.

We find, then, that the owner of merchandise exported through the port of New York by the canal to Acapulco would have to pay a charge or tax of $1.20 a ton (net registered ship measurement) at the customhouse of New York, and that the owner of merchandise exported through the port of Seattle to Acapulco would pay nothing at the customhouse of Seattle.

It would seem from this that the canal toll, regarded as a tax on merchandise, is in conflict with two provisions of the Constitution which have been quoted above. First, it would seem to be in conflict with that provision of Article I, § 8, which requires that "all duties, imposts, and excises shall be uniform throughout the United States." Second, it would seem to be in conflict with that provision of Article I. § 9, which prohibits a tax or duty on articles exported from any state.

Both of these provisions of the Constitution were brought before the Supreme Court in Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135.

The act of June 13, 1898, (chap. 448, 30 Stat. at L. 448, U. S. Comp. Stat. 1901, p. 2286) imposed a stamp tax of 10 cents on foreign bills of lading, exempting bills of lading for ports of Canada from the tax, and provided that the railroad agent issuing the bill of lading must affix the stamp, imposing penalties if he did not.

Fairbanks, an agent of the Northern Pacific Railway Company, was convicted in the United States district court for the district of Minnesota, on the charge of issuing an export bill of lading upon certain wheat exported from the state of Minnesota to Liverpool, England, without affixing the 10 cent revenue stamp as required by the statute, and sentenced to pay a fine of $25. He contended on the trial that the act, so far as it imposed a stamp tax on foreign bills of lading, was in conflict with Article I. § 9, of the Constitution. The Supreme Court reversed the trial court on appeal, and held that:

"A stamp tax on a foreign bill of lading is, in substance and effect, equivalent to a tax on the articles included in that bill of lading, and therefore is a tax or duty on exports, and therefore in conflict with Article I. § 9, of the Constitution of the United States, that 'no tax or duty shall be laid on articles exported from any state.'"

The opinion of the court delivered by Justice Brewer is exceedingly exhaustive in its discussion of the limitations on the power of Congress in imposing taxes, and reviews and cites many of its precedent decisions on more or less parallel questions. The quotations from the

opinion which follow seem well in point with the issue made by Panama Canal tolls with the same provisions of the Constitution.

The court, in the beginning of its opinion, cites from the opinion of Chief Justice Marshall in Marbury v. Madison, 1 Cranch, 137, 177, 2 L. ed. 60, 73, words which, in these later times when Presidents and editors dance Mexican tangoes over the Constitution, read like an invocation to the spirits of George Washington and the other real immortals, who created it out of nothing, to guide the court aright in its judgment.

"The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."

Then the court, continuing in its own words, said:

"If powers granted are to be taken as broadly granted, and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. . . .

"If, for instance, Congress may place a stamp duty of 10 cents on bills of lading on goods to be exported it is because it has power to do so, and if it has power to impose this amount of stamp duty, it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. . . .

"The question of power is not to be determined by the amount of burden attempted to be cast. The constitutional language is 'no tax or duty.' A 10-cent tax or duty is in conflict with that provision as certainly as an hundred dollar tax or duty. Constitutional mandates are imperative. The question is never one of amount, but one of power. The applicable maxim is *obsta principiis*, not *de minimis non curatur lex*. . . .

"The form in which the burden is imposed cannot vary the substance."

The court cites with approval from Income Tax Cases (Pollock v. Farmers' Loan & T. Co.) 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912:

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution or of the rule of taxation and representation so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance, and not the form which controls, as has indeed been established by repeated decisions of this court."

The parallel between the stamp tax on foreign bills of lading imposed by the act of June 13, 1898, and the Panama Canal toll imposed under the act of August 24, 1912, on vessels which engage in our foreign commerce through the canal, seems complete. Congress, it may be seen, could have enacted that the canal toll on our foreign commerce shall be paid by a stamp affixed to the bill of lading of merchandise routed through the canal from one of our ports, as appropriately as it did enact that it shall be paid by the vessel carrying the merchandise and be collected by a mode to be thereafter fixed by the pleasure of the President. It would be the same sum of money actually paid by the same persons to the same United States, either way of the statute. There would have been no change of substance of the tax and hardly enough change of form to confuse the simplest intelligence as to the sameness of the substance. The shipper of merchandise through the port of New York by the canal to Acapulco, Mexico, would pay the same sum to the United States, whether he paid it as a stamp tax by affixing a stamp to his bill of lading, or paid it as a canal toll in an increased freight charge. Also the same shipper of the same merchandise through the port of Seattle to Acapulco, Mexico, would be as free of any stamp tax on his bill of lading, as well as free of any canal toll in his freight charge.

The discussion has been made here of toll on foreign commerce of our states which would be passing through the canal under the provisions of the Panama Canal act of August 24, 1912, the

act now in force. It is obvious that the same conditions of preference between ports, ununiformity of tax at ports of different states, and imposition of a tax or duty on exports, would arise with toll imposed on our coastwise vessels conducting interstate commerce. A canal toll on either our foreign or interstate commerce seems inevitably in conflict with prohibitions in the Constitution.

The interpretation put on the provisions of the Hay-Pauncefote treaty cannot affect these conclusions. The conditions from which they follow are entirely outside of the scope of the treaty. The Constitution of the United States is the supreme law, and the treaty has only force so far as its provisions are not in derogation of provisions of the Constitution. The Panama Canal must be operated toll free to both our interstate and foreign commerce by paramount force of the constitutional provisions, unless the conclusions expressed above as to their force are in error.

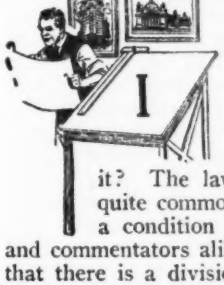
The commerce of foreign nations between themselves through the Panama Canal is on a different basis from our own commerce. Congress has power to impose toll on that commerce within such limitations as may be made by the provisions of the Hay-Pauncefote treaty. It is not seen how the Hay-Pauncefote treaty could have been made with presumption that it had force with reference to any other commerce than that of foreign nations between themselves, using the canal.

Regarded as a practical matter, the toll which might be collected in reasonable charges from the commerce of foreign nations between themselves, is comparatively, with the total expense of canal operation, a very small offset. It would nearly all be paid by our next-door neighbors, the peoples of the nations of North and South America. The part not paid by them would be paid by the peoples of New Zealand and Australia. As the Panama Canal cost account stands now, $200,000,000 of the cost has been paid, and finally discharged, from the current income of the United States, and $180,000,000, represented by 3 per cent bonds, is unpaid. The total annual charges of operation are $4,000,000 of expense and $5,400,000 of bond interest, $9,400,000 in all—10 cents *per capita* per annum for 94,000,000 population of our states according to the Census of 1910. Perhaps the collectable tolls on commerce of foreign nations using the canal between their ports would reduce the *per capita* per annum charge on our people by 1 cent. Why not, then, everybody agree to be Californians and forget the cent. The Constitution makes the canal free for our states' commerce, why not extend the Constitution—by construction—forgetting the Hay-Pauncefote treaty—and make the canal free for the commerce of all nations for all time?

Russell L. Dunn

Mechanics' Lien for Materials Unincorporated in Improvement

BY L. A. WILDER



IS a structure subject to the enforcement of a mechanics' lien for materials furnished for its erection but not incorporated into it? The law on this topic is quite commonly stated to be in a condition of chaos. Judges and commentators alike are wont to say that there is a division of authority on the question, and to substantiate this by the citation of a great number of authorities to each of two diametrically opposed propositions,—one that the use of materials furnished in good faith for a building is necessary in order to sustain the lien, and the other that there may be a lien in such circumstances whether use is actually made of the materials or not.

As a matter of fact, the cases thus cited cover a considerable range of the mechanics' lien law, and actually involve various and distinctive questions, and are to a large extent distinguishable for that reason. The major questions which are contained in those decisions, and which serve as the principal basis for distinguishing them are two in number. The first is whether there may be a lien for materials furnished but never used at all, and the second is whether materials furnished and employed or consumed in the process of the work, but not entering into and becoming a part of the final structure, are materials contemplated by the mechanics' lien law. It will be at once observed that the materials involved in the first situation, having been furnished for the structure, are lienable, and the only question is whether the nonuse of such lienable articles precludes the lien, whereas, in the other case, the materials were furnished for, and were used in, temporary work, and the question is whether materials are lienable at all when not intended to be, and not in fact, incorporated into the structure.

When the decisions have been lined up on these two questions, and have then been analyzed in view of the particular statutes involved, it is found that much of the so-called conflict has been dissipated.

For instance, assuming for the purposes of this discussion that the materials were furnished for the particular work, and that their nonuse was not due to defects therein or to the failure to complete the structure, whether through the default of the contractor or builder or otherwise, an analysis of the decisions on the first question, that is, the point whether materials furnished for a structure, but not actually used therein, constitute the basis of a mechanics' lien, results in the deduction of several distinctive rules which may be briefly summarized by the statement that there is a conflict among the decisions involving statutes which provide for a lien for materials furnished "for" a structure; that where the lien is given for materials furnished "for the construction" of an improvement, the decided weight of authority inclines to the view that the actual use of the articles furnished is not necessary; that, likewise, the actual use of the materials is held unnecessary where the legislature has subjected buildings to debts contracted for materials furnished for or in the erection thereof; but that where the lien is given for furnishing materials "used" or "to be used" in an improvement, the rule is that the use of the materials furnished is a prerequisite to the enforcement of the lien.

Materials Not Used.

In deducing the rules just mentioned, it is necessary to ignore a number of decisions which do no more than utter generalities,—and cases of that character are seldom valuable in fixing legal principles. For instance, in a considerable number of decisions the courts have considered this question abstractly, and decided it either in the affirmative or the negative without assigning any satisfactory reason for the decision. In some cases the courts state broadly that to sustain a mechanics' lien for materials furnished for a structure, it must appear that the materials were actually used in its construction.[1] On the other hand, it has been just as broadly asserted in a few jurisdictions that where the materials are furnished in good faith for a particular structure specified in the contract, the furnisher's lien does not depend for its existence or enforcement upon the use of the materials for that purpose.[2] But, as said before, the cases which do more than utter generalities may be said, for the most part, to turn upon the language of the particular statutes involved. Occasionally, the question whether the materials were furnished to the contractor or subcontractor on the one hand, or to the owner on the other, has been an important factor in reaching a conclusion in a particular case. And this difference, if difference there be, is in itself sometimes traceable to the variation of the phraseology of the statutes. The potency of the various statutes to influence a decision may perhaps be illustrated by reference to one or two miscellaneous decisions which involve unusual statutes. Under a statute giving a lien for the contract price of the materials, it seems that the actual use of the materials is not essential to the enforcement of the lien,[3] while materials not delivered because not accepted are not lienable under a statute giving a lien for materials "furnished,"[4] and

[1] Robinson v. Crotwell Bros. Lumber Co. 167 Ala. 566, 52 So. 733; Silvester v. Coe Quartz Mine Co. 80 Cal. 510, 22 Pac. 217; Bewick v. Muir, 83 Cal. 368, 23 Pac. 389; Chapin v. Persse & B. Paper Works, 30 Conn. 461, 79 Am. Dec. 263; Potter Mfg. Co. v. A. B. Meyer & Co. 171 Ind. 513, 131 Am. St. Rep. 267, 86 N. E. 837; Leeper v. Myers, 10 Ind. App. 314, 37 N. E. 1070; Rice v. Hodge, 26 Kan. 164; Hill v. Bowers, 45 Kan. 592, 26 Pac. 13; McGarry v. Averill, 50 Kan. 362, 34 Am. St. Rep. 120, 31 Pac. 1082; Consolidated Engineering Co. v. Crowley, 105 La. 615, 30 So. 222; Smalley v. Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797; North v. Globe Fence Co. 144 Mich. 557, 108 N. W. 285; Missoula Mercantile Co. v. O'Donnell, 24 Mont. 75, 60 Pac. 594, 991.

[2] Neilson v. Iowa Eastern R. Co. 51 Iowa, 184, 714, 33 Am. Rep. 124, 1 N. W. 434, 3 N. W. 779; Lee v. Hoyt, 101 Iowa, 101, 70 N. W. 95; St. Croix Lumber Co. v. Davis, 105 Iowa, 27, 74 N. W. 756 (inferentially); Watts v. Whittington, 48 Md. 353 (citing Greenway v. Turner, 4 Md. 296, which does not really decide the point); Maryland Brick Co. v. Spilman, 76 Md. 343, 17 L.R.A. 599, 35 Am. St. Rep. 431, 25 Atl. 297; Maryland Brick Co. v. Dunkerly, 85 Md. 199, 36 Atl. 761; Huttig Bros. Mfg. Co. v. Denny Hotel Co. 6 Wash. 122, 624, 32 Pac. 1073, 34 Pac. 774 (suspension of work by contractor); Larkin v. Larkin, 32 Ont. Rep. 80. While the case of Esslingler v. Huebner, 22 Wis. 632, does not stand for this broad rule, it is therein held that one who sells materials to the owner, with the understanding that they are to be used in the building, may have a lien therefor, although the owner diverts the materials to other purposes and obtains substitute materials for the building from other sources.

[3] Thus, under a statute providing that a materialman shall have a lien for the value of materials furnished at the instance of the owner, or of any other person acting by his authority as agent, contractor, or otherwise, and providing, further, that in case of a contract between an owner and a contractor, the lien shall extend to the entire contract price, and that such contract shall operate as a lien in favor of all persons except the contractor to the extent of the whole contract price, and after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor,—it was held in Sierra Nevada Lumber Co. v. Whitmore, 24 Utah, 136, 66 Pac. 779, that the lien of a subcontractor furnishing materials to the contractor for a stipulated price was not for the actual value of the materials furnished, but that the extent of the lien was measured by the subcontract price within the limits of the original contract price; and that since this was so, the subcontractor's lien for the subcontract price was not affected by the failure of the contractor to use the materials furnished by him.

[4] Materials prepared in pursuance of a contract with a contractor, but not actually used or delivered because of his breach of the contract by his refusal to accept them, are not "furnished" so as to create a subcontractor's lien although they are worthless for any other purpose. Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co. 15 C. C. A. 289, 31 U S. App. 704, 68 Fed. 105, 34 L.R.A. 625.

actual use is held necessary under statutes giving a lien for materials furnished toward the completion or performance of any contract.[5]

Where Statute Gives Lien for Materials Furnished "for" a Structure.

The courts are not entirely agreed upon the question whether the use of materials is necessary to support a lien under a statute giving a lien to every person who shall furnish materials "for" any building. Some cases hold that there can be no lien unless the materials are actually used, under such a statute,[6] or under a statute giving a lien to persons furnishing materials for or on account of any vessel.[7] Before the Illinois legislature passed an act expressly dealing with the necessity that materials be used,[8] the Illinois court held that under a statute giving a lien to any person who should by contract with the owner furnish material for any building, and extending the lien to all materials furnished, the materials so furnished must be actually used in order to sustain the lien,[9] though not, of course, going so far as to hold that the right to a lien would be affected by a diversion of a small part of the materials to other uses.[10]

Leaving out of consideration two decisions which turn upon the particular facts involved,[11] there seem to be but two jurisdictions in which a contrary result has been reached under a statute of this kind. It has been held in Iowa and Missouri that under a statute giving a lien to any person furnishing any materials for a building, a lien may be enforced although it is not made to ap-

[5] Smalley v. Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797. The court in Goodrich v. Gillies, 62 Hun, 479, 17 N. Y. Supp. 88, involving a statute of this kind, held that there could be no lien where it was not established that the materials were furnished for the building or that they were used therein. It will be noted that the disjunctive was used by the court, and for this reason it cannot be said that the question was decided as to whether it was necessary to use the materials so long as they were furnished for the particular structure.

[6] It was so held in Central Lumber Co. v. Braddock Land & Granite Co. 84 Ark. 560, 105 S. W. 583, 13 Ann. Cas. 11. *A fortiori* the mere fact of furnishing articles suitable for use in carrying on a railroad, without any understanding or agreement that they should be so used, will not of itself, without actual application to the business, give the furnisher a lien, under a statute making provision for a lien in favor of persons who furnish materials for carrying on such business. Tod v. Kentucky Union R. Co. 3 C. C. A. 60, 6 U. S. App. 186, 52 Fed. 241, 18 L.R.A. 305.

[7] Under a statute giving a lien to persons furnishing materials for or on account of any vessel, no lien can be asserted except for the materials actually expended upon the property to which it attaches. Taggard v. Buckmore, 42 Me. 77; Perkins v. Pike, 42 Me. 141, 66 Am. Dec. 267. To the same effect are Phillips v. Wright, 5 Sandf. 342, which was followed in Hiscox v. Harbeck, 2 Bosw. 506; and Re Froment, 110 App. Div. 72, 96 N. Y. Supp. 1061 (see for reversal on other grounds 184 N. Y. 568, 77 N. E. 9, and for subsequent appeal 125 App. Div. 647, 109 N. Y. Supp. 1073).

[8] The act referred to provided that the lien for materials should not be defeated because of lack of proof that the material, after the delivery thereof, actually entered into the construction of the building or improvement, provided it was shown that such material was in fact and in good faith delivered at the place where such building or improvement was being constructed, for the purposes of being used in such construction. Of course, so far as the question here considered is concerned, cases arising under such a statute present no difficulty. If the perusal of one or two illustrative cases construing the statute is found desirable, reference may be had to Keeley Brewing Co. v. Neubauer Decorating Co. 194 Ill. 580, 62 N. E. 923, and Francis Beidler & Co. v. Hutchinson, 233 Ill. 192, 84 N. E. 228.

[9] Hunter v. Blanchard, 18 Ill. 318, 68 Am. Dec. 547; Compound Lumber Co. v. Murphy, 169 Ill. 343, 48 N. E. 472; Brunner v. Picking, 75 Ill. App. 393; Hunter v. Blanchard, supra, was followed in Cox v. Colles, 17 Ill. App. 503, holding that the placing of machinery in a mill without the knowledge or consent of the owner, followed by an immediate disclaimer and detachment, did not constitute such a use as would sustain a mechanics' lien.

[10] Chicago Artesian Well Co. v. Corey, 60 Ill. 73, holds that the right to a lien for materials furnished at the request of the owner of land, for the purpose of making improvements thereon, is not affected by the fact that he diverts a small portion of them to other uses.

[11] Under a statute giving a lien to persons who shall furnish materials for the improvement of real estate at the request of the owner, one who so furnishes and delivers materials is entitled to a lien although they are not incorporated into the improvement, where the failure to use them was due to the bankruptcy of the owner. Sears v. Wise, 52 App. Div. 118, 64 N. Y. Supp. 1063.

pear that the materials were actually used;[12] and though the Iowa court has denied a lien where the nonuse of the materials was due to the fault of materialmen,[13] it upholds the lien where the nonuse is due to causes not within his control.[14]

"For Construction" or "Erection" of Structure.

With a single exception[15] the cases involving statutes giving liens for materials furnished for the construction or erection of a structure uphold the lien, declaring that it is not affected by the nonuse of the materials[16] or a part of them,[17] except where the unused portion is returned,—[21] and this whether the nonuse is due to the fault of the owner[19] or of the contractor.[20] And a like rule obtains in reference to liens against railroads[21] or mills[22] where there are special statutes couched in similar language.

For "Debts Contracted" for Materials.

The Pennsylvania courts have applied the broad rule that the actual use of the materials is unnecessary, where they were furnished to the contractor, but for

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And under a statute giving a lien to all persons furnishing material or machinery for altering any mill, one who furnished a cylinder to the owner of a mill, for the purpose of replacing a cracked cylinder, was entitled to a lien although the old cylinder had been repaired before the arrival of the new one, and the latter had not been applied to the use of the mill, but had been set on blocks near by to be ready as soon as the old cylinder could no longer be used. Totten & H. Iron & Steel Foundry Co. v. Muncie Nail Co. 148 Ind. 372, 47 N. E. 703.

[12] Frudden Lumber Co. v. Kinnan, 117 Iowa, 93, 90 N. W. 515; Hobson Bros. v. Townsend, 126 Iowa, 453, 102 N. W. 413; Morrison v. Hancock, 40 Mo. 561.

[13] Thus, the Iowa court holds that no lien can be enforced where a materialman who shipped the materials upon the order of the contractor refused to turn them over to the owner after the contractor's contract had been terminated, and upon request by the contractor that he turn them over. A. E. Shorthill Co. v. Ætna Indemnity Co. — Iowa, —, 124 N. W. 613.

[14] It is held in Neilson v. Iowa Eastern R. Co. 51 Iowa, 184, 714, 33 Am. Rep. 124, 1 N. W. 434, 3 N. W. 779, that the right to a lien for the full value of ties furnished for the construction of a railroad is not defeated by the fact that some of them are not used, at least where the nonuse is due to the fact that more ties were contracted for than were required; the corporation being unable, for want of means, to construct as much railroad as was contemplated.

[15] Hill v. Bowers, 45 Kan. 592, 26 Pac. 13, holds that under a statute giving a lien to any person who shall furnish material for erecting any fence, materials purchased to be used in the structure must be actually used in order to sustain the lien.

[16] Small v. Foley, 8 Colo. App. 435, 47 Pac. 64; Daniel v. Weaver, 5 Lea. 392; Jonte v. Gill, — Tenn. —, 39 S. W. 750; Luttrell v. Knoxville, L. F. & I. R. Co. 119 Tenn. 492, 123 Am. St. Rep. 737, 105 S. W. 565; Trammell v. Mount, 68 Tex. 210, 2 Am. St. Rep. 479, 4 S. W. 377.

[17] Beckel v. Petticrew, 6 Ohio St. 247, followed in Franklin Bank v. Cincinnati, 10 Ohio S. & C. P. Dec. 545; Burns v. Sewell, 48 Minn. 425, 51 N. W. 224.

[18] Murphy v. Fleetford, 30 Tex. Civ. App. 487, 70 S. W. 989.

[19] Howes v. Reliance Wire Works Co. 46 Minn. 44, 48 N. W. 448; Trammell v. Mount, 68 Tex. 210, 2 Am. St. Rep. 479, 4 S. W. 377.

[20] The Minnesota court holds that the right of an innocent materialman to a lien cannot be impaired by the wrong or fraud of the contractor in which he in no manner participates, where the statute provides that whoever furnishes material for the erection of a building, by virtue of a contract with or at the instance of the owner thereof, or his contractor or subcontractor, shall have a lien to secure the contract price or value of the same. Berger v. Turnblad, 98 Minn. 163, 116 Am. St. Rep. 353, 107 N. W. 543.

[21] Thus, it is held that irrespective of whether the intended use is made of the articles, there may be a lien for materials furnished or delivered, under a statute giving a lien to one who furnishes materials to a railroad company for the construction or improvement of the road or its equipment. Westinghouse Air Brake Co. v. Kansas City Southern R. Co. 71 C. C. A. 1, 137 Fed. 26; Central Trust Co. v. Chicago, K. & T. R. Co. 54 Fed. 598. It is therefore held that it is not fatal to the lien that some of the brakes furnished to the company for its cars were used on the cars of other companies (Westinghouse Air Brake Co. v. Kansas City Southern R. Co. supra); or that ties delivered to and accepted by the company were not used (Central Trust Co. v. Chicago K. & T. R. Co. supra).

[22] A statute providing that every person furnishing material or machinery for constructing any mill, manufactory, or other structure shall have a lien, includes spare rolls furnished with machinery installed in a rolling mill, it appearing that they are a necessary part of the equipment. Canton Roll & Mach. Co. v. Rolling Mill Co. 93 C. C. A. 621, 168 Fed. 465, writ of certiorari denied in 214 U. S. 513, 53 L. ed. 1071, 29 Sup. Ct. Rep. 695.

or on the credit of the building;[23] and it has been said that this rule does not bear hard upon the owner, for he has it in his power to detain the price of the building while there are outstanding charges against him, or to stipulate for security against those that might afterward turn up; and that if he settles with the contractor without exercising common prudence of this kind, he cannot charge the materialman with the consequences of his own carelessness.[24] While the Pennsylvania courts have seldom made reference to any state, a few of the early cases which invoke the rule, and which may or may not, but probably do, mark its inception, were based upon the phraseology of the statute of 1806, which provided that a building should be subject to all debts contracted for or by reason of any materials found and provided by any lumber merchant, etc., for or in the erecting and constructing of such building.[25]

The rule of the above Pennsylvania cases was recognized in a case decided in 1890,[26] which, however, referred to the act of 1836 couched in similar language. And the rule was recognized, though held not to apply, where the nonuse of the materials was due to failure to deliver them before completion of the building.[27] While the lien was denied where the materials were furnished upon the credit of the contractor, and not of the building,[28] or where furnished to a subcontractor as distinguished from a contractor,[29] a lien was allowed where the materials were sold at a sheriff's sale as the property of the contractor,[30] and where the contractor failed to complete his contract[31] or use the materials in outhouses.[32] Other Pennsylvania decisions turned more or less on the question of the necessity that the materials be furnished on the credit of the building.[33] The case of Boyd v. Mole seems to stand by itself among the other Pennsylvania decisions.[34] While it recognizes the general Pennsylvania rule, it states in effect that the materialman cannot recklessly furnish materials for a building without reference to what are necessary, but that he must have an eye to the character of the building upon the credit of which he sells his materials, and see to it that only those necessary for and fit to be used in the building are charged to its account; the ultimate decision being that while, in enforcing his lien, he will be confined to materials furnished by him which could reasonably have been used in the building, he is entitled to his lien therefor although such reasonable amount was not actually used.

[23] Presbyterian Church v. Allison, 10 Pa. 413; White v. Miller, 18 Pa. 52; Odd Fellows' Hall v. Masser, 24 Pa. 507, 64 Am. Dec. 675; Basch v. Sener, 1 Pennyp. 22; Linden Steel Co. v. Imperial Ref. Co. 146 Pa. 4, 23 Atl. 800; Spruks Bros. v. Mursch, 1 Lack. Leg. News, 247.

[24] White v. Miller, 18 Pa. 52.

[25] Hinchman v. Graham, 2 Serg. & R. 170; Wallace v. Melchoir, 2 Browne (Pa.) 104.

[26] Murphy v. Ellis, 11 Pa. Co. Ct. 301.

[27] Re Olympic Theatre, 2 Browne (Pa.) 275.

[28] Odd Fellows' Hall v. Masser, 24 Pa. 507, 64 Am. Dec. 675.

[29] Harlan v. Rand, 27 Pa. 511.

[30] Thus, it was held that the materialman might have a lien though the materials were sold at sheriff's sale as the property of the contractor, at least where the purchaser at the sale entered into a contract for the completion of the building and made use of the materials. Linden Steel Co. v. Imperial Ref. Co. 146 Pa. 4, 23 Atl. 800.

[31] Linden Steel Co. v. Rough Run Mfg. Co. 158 Pa. 238, 27 Atl. 895.

[32] Hershey v. John, 1 Pennyp. 40; Gaule v. Bilyeau, 25 Pa. 521.

[33] In Scranton Lathe Turning Co. v. Cassidy, 167 Pa. 469, 31 Atl. 734, the court in passing on a charge by the trial court that the lien should be restricted to the value of the materials shown to have been furnished on the credit of the building, and actually used therein, said that if this was not strictly correct, the defendant was not the proper person to complain.

In Craig v. Commercial Trust Co. 211 Pa. 7, 60 Atl. 317, it was held that where the materialman furnished materials for temporary work, and could not reasonably have expected that they would enter into and become a part of the structure, it was incumbent upon him to show either that they were furnished upon the credit of the building, or that they were actually used therein.

So, where the materialman, pending the selection of a trust company whose approval of the plans he knew would be necessary, accepted an order for certain materials from the owner, but was notified by the trust company after its selection that such materials would not be required, he was held not entitled to the lien for the materials furnished after the notice, where they were not placed in the building nor used. Stephens v. Campbell, 13 Pa. Super. Ct. 7.

[34] 9 Phila. 118.

The New Jersey statute, like that of Pennsylvania, provides that the building shall be liable for the payment of any debts contracted and owing to any person for materials furnished for the erection and construction thereof; and the courts of that state expressly follow the Pennsylvania decisions, in holding that the right to a lien depends not upon the use of the materials, but upon the fact that the debt was incurred and materials furnished for the purpose of the building.[35]

For Materials "Used" or "To Be Used."

Where the statute employs the word "used" in reference to the materials for which a lien will lie, the use of the materials is held necessary where the point is not expressly covered by contract,[36] whether the phrase employed be "actually used," [37] "used," [38] or "to be used," at least where the materials were not sufficiently delivered,[39] or were furnished with no intention of claiming a lien.[40] Though the Oregon court conceded in one case [41] that the materials must be used, it subsequently took the view that a statute creating a lien in favor of every lumber merchant furnishing material to be used in the construction of a building, and constituting the contractor the agent of the owner for the purposes of the act, had the effect of confining the lien to the property benefited by the material entering into the construction of the building, and, consequently, of limiting the power of the contractor to that of a special agent, capable of binding the property only for the payment of the reasonable value of material ordinarily sufficient properly to construct the building.[42] The Nebraska statute provides in § 1 that any person who shall furnish any material for a building by virtue of a contract, express or implied, with the owner or his agent, shall be entitled to a lien; and it is pro-

[35] Morris County Bank v. Rockaway Mfg. Co. 14 N. J. Eq. 189, followed in Bell v. Mecum, 75 N. J. L. 547, 127 Am. St. Rep. 809, 68 Atl. 149, and cited with approval in Campbell v. John W. Taylor Mfg. Co. 64 N. J. Eq. 344, 51 Atl. 723, the question in the latter case, however, being whether machinery for a manufacturing plant constituted materials within the lien law.

[36] Expressly avoiding a decision of the question whether a materialman furnishing articles upon a builder's order, as well as his representation that they are to be used in a certain building, may have a lien where the materials are diverted to other uses, under a statute giving a lien to persons furnishing materials to be used in the construction of any building,—the court in McArthur v. Dewar, 3 Manitoba L. Rep. 72, held that an original contractor could enforce a lien without showing the fact of use in construction for materials furnished in pursuance of his contract with the owner, which provided that "the building, the ground attached, and the materials now on and to be placed thereon from the commencement to the finishing of the works, are to be considered in the possession" of the owner.

[37] Wardlaw v. Troy Oil Mill, 74 S. C. 368, 114 Am. St. Rep. 1004, 54 S. E. 658.

[38] Under a statute providing that a lien shall exist in favor of any person who shall furnish any material used in the construction or repair of any structure, a lien cannot be asserted for all of the materials furnished to the owner while only a portion of them were used. Manatee Light & Traction Co. v. Tampa Plumbing & Supply Co. 52 Fla. 533, 42 So. 703.

[39] Under a statute giving a lien to persons furnishing materials to be used in the construction of any building, a materialman who furnishes materials to be used in a particular building cannot have a lien therefor unless they are actually used, at least where they are delivered, not at the building upon which the lien is claimed, but at the shop of the contractor, who disposes of them to his own use. Allen v. Redward, 10 Haw. 151, recognized in Allen v. Lincoln, 12 Haw. 356.

So, under a statute giving a lien to persons who furnish materials to be used in the construction of any building, it was held in W. P. Fuller & Co. v. Ryan, 44 Wash. 385, 87 Pac. 485, that the materialman was not entitled to a lien where such material was neither used in the building nor taken to the premises for that purpose; the court saying that the actuating thought of the legislature must have been that the materialman should retain a lien for the purchase price upon the thing itself, and that this could be accomplished only by allowing a lien upon the building in the premises into which or upon which the materials should become incorporated or delivered.

[40] Where the materialman furnishes the materials without any intention of claiming a lien, and relies solely upon the responsibility of the contractor, he cannot thereafter successfully seek to assert a lien, unless he clearly shows that the materials were used in the building. Knudson-Jacob Co. v. Brandt, 44 Wash. 68, 87 Pac. 43.

[41] Allen v. Elwert, 29 Or. 428, 44 Pac. 823, 48 Pac. 54.

[42] Fitch v. Howitt, 32 Or. 396, 52 Pac. 192.

vided in § 2 that any person who shall furnish materials for a building to the contractor or any subcontractor, and who shall desire to secure a lien upon the structure, may file a sworn statement containing certain specifications, "together with a description of the land upon which the same were used," within a certain time, and that if the contractor does not pay him, he will be entitled to a lien for the materials furnished, and in the same manner as the original contractor. While it is intimated that a lien may be had under this act for materials furnished under a contract between the materialman and the owner himself, at least where there is a sufficient delivery,[43] it seems that where they are furnished under a contract with the contractor, actual use is necessary in addition to delivery,[44] if the delivery is not made in circumstances charging the owner with notice of it.[45] The special Nebraska statute giving a lien upon a railroad for materials furnished in its construction is held not to require their actual use inasmuch as it gives a lien for materials "furnished."[46]

Where Statute Makes Diversion of Material an Offense.

Where the statute provides that any contractor or subcontractor who shall purchase materials on credit, and represent that they are to be used in a certain building, and shall thereafter use them in the construction of any other building or improvement, with the intent to defraud the person from whom they were purchased, without first giving him notice, shall be guilty of a misdemeanor, —and since the materialman can be defrauded only by being deprived of the lien to which he supposed he would be entitled, it must be held that a materialman who furnishes materials to a contractor is entitled to a lien only when the materials furnished are actually used in the improvements.[47]

Consumption of Materials in Temporary Structures.

It will be recalled that at the outset of this article, allusion was made to the distinction between the cases above cited and those concerned with the question whether materials wholly or partially consumed in the process of the work, but not becoming a part of the structure, are lienable. The distinction between these two lines of cases, that is, the difference between the effect of the failure to use lienable articles and the lienability of materials used for temporary purposes, was expressly observed in a recent decision of the Missouri appellate court[48] when it stated that the earlier Missouri cases, holding that in order to entitle the materialman to a lien against the structure he must show that the materials entered into the consruction, determine that the materials must be used in the process of the work, but that they

[43] Foster v. Dohle, 17 Neb. 631, 24 N. W. 208; Marrener v. Paxton, 17 Neb. 634, 24 N. W. 209.

[44] Ibid; Weir v. Barnes, 38 Neb. 875, 57 N. W. 750; Ashford v. Iowa & M. Lumber Co. 81 Neb. 561, 116 N. W. 272; Sabin v. Cameron, 82 Neb. 106, 117 N. W. 95.

[45] Foster v. Dohle, 17 Neb. 631, 24 N. W. 208; Marrener v. Paxton, 17 Neb. 634, 24 N. W. 209.

[46] Stewart-Chute Lumber Co. v. Missouri P. R. Co. 28 Neb. 39, 44 N. W. 47.

[47] Simmons v. Carrier, 60 Mo. 581, followed in Fitzpatrick v. Thomas, 61 Mo. 513, and Schulenberg v. Prairie Home Institute, 65 Mo. 295. In the following cases the court assumed the rule as established, without referring to the statute: Grace v. Nesbitt, 109 Mo. 9, 18 S. W. 1118; Schulenburg v. Hawley, 6 Mo. App. 34; Hydraulic Press-Brick Co. v. Zeppenfeld, 9 Mo. App. 595 (memorandum); Deardorff v. Everhartt, 74 Mo. 37; Heltzell v. Chicago & A. R. Co. 20 Mo. App. 435; Steinkamper v. McManus, 26 Mo. App. 51; Fathman & M. Planing Mill v. Ritter, 33 Mo. App. 404; Rall Bros. v. McCrary, 45 Mo. App. 365; Current River Lumber Co. v. Cravens, 54 Mo. App. 216; Western Brass Mfg. Co. v. Mepham, 64 Mo. App. 50; A. M. Stevens Lumber Co. v. Kansas City Lumber Co. 72 Mo. App. 248; Uhrich v. Osborn, 106 Mo. App. 492, 81 S. W. 228; Darlington Lumber Co. v. Harris, 107 Mo. App. 148, 80 S. W. 688; Riverside Lumber Co. v. Schmidt, 130 Mo. App. 227, 109 S. W. 71; Meyer v. Schmidt, 131 Mo. App. 53, 109 S. W. 833; United States Water Co. v. Sunny Slope Realty Co. 152 Mo. App. 300, 133 S. W. 371.

[48] E. R. Darlington Lumber Co. v. Westlake Constr. Co. 161 Mo. App. 723, 141 S. W. 931, which referred to Andrews v. St. Louis Tunnel R. Co. 16 Mo. App. 299, as disapproving Knapp v. St. Louis, K. C. & N. R. Co. 6 Mo. App. 205, in which a lien had been denied for materials used for temporary structures in railroad work.

do not decide that they must form a permanent part of the improvement. The precise decision of the appellate court may perhaps be best indicated by its own summary, which is in these words: "Where certain material is provided for by the contract in erection of a structure and is furnished and used accordingly, and is, either in whole or in part, consumed in its use, the materialman is entitled to a lien for the material thus consumed in the erection of the structure, to the extent of the consumption of its reasonable value, regardless of the fact whether or not such material formed a permanent part of the structure when completed. Consumption of value means the depreciation of the market value of the material by use provided for by the contract." The court further said in reaching its conclusion: "We have not overlooked the fact that a number of cases in other jurisdictions, referred to by counsel for respondent, hold that, while all remedial portions of the mechanics' lien law should be liberally construed, those on which the right to a lien depends, being in derogation of the common law, should be strictly construed. No such distinction is made by the cases in this state. It is evident, however, that, even if such distinction properly exists, it is of paramount importance that all provisions of law must be reasonably construed, so as to give effect to the manifest object of the statute in protecting both the contractor and the owner."

A like view is taken in a Kentucky case[49] which holds that one furnishing lumber for the forms in which to mold the concrete for a building is entitled to a lien for its value, under a statute giving a lien to anyone who furnishes material in the erection of a building or for the improvement of real estate, if the lumber is destroyed in the use, although it becomes no part of the building. An excellent case on this question was recently decided in Wisconsin,[50] and holds that lumber and hardware furnished to one who had contracted to erect a dam, and used for the purpose of building a cofferdam and for other temporary purposes, was lienable under a statute giving a lien for materials furnished for or in or about the construction of any structure, where, although they became no part of the permanent dam, at least a part of the lumber was good only for firewood, and the hardware was of value only as scrap iron. It should also be noted that in this case it appeared that the contractor abandoned the work, and that the owner himself used the materials for the temporary structure, but no particular stress was laid upon this fact by the court in its opinion. The feature which recommends the case to special consideration is the distinction, or perhaps it may be said the test, which it makes in determining the lienability of materials. As reference to that case will show, the test is, primarily at least, whether the materials are to be regarded as practically consumed in the process of the work, or whether they are to be regarded as becoming a part of the equipment of the contractor. That is to say, a distinction is made between tools and machinery and instrumentalities constituting a part of the equipment, and other supplies which, although used by the contractor merely for the purpose of facilitating his work, are consumed or mutilated so as to be of little or no value for future undertakings.[51]

While it is true that the foregoing decisions from Missouri, Kentucky, and Wisconsin are decidedly in the minority, they can hardly be cast aside and disregarded for that reason, for, at this writing, they are about the last words on this peculiar phase of the mechanics' lien, and are based upon a sound distinction which has always existed and whose observation progress now makes desirable. Differing between themselves in minor details, two of them allowing liens for materials furnished when they are largely or practically consumed in the process of the work, the other allowing a lien at least to the extent to which the value of the materials has depreciated by use,—both decisions, it is predicted, will be regarded as something like pion-

[49] Avery & Sons v. Woodruff, 144 Ky. 227, 36 L.R.A.(N.S.) 866, 137 S. W. 1088.

[50] Barker & S. Lumber Co. v. Marathon Paper Mills Co. 146 Wis. 12, 36 L.R.A.(N.S.) 875, 130 N. W. 866.

[51] Ibid.

eers in the creation of a new rule of law, or in the ingrafting of an exception upon the old law.

But be this as it may, the fact remains that those decisions are, as said before, greatly outweighed, for it is held that no lien can be had for materials which do not become a permanent part of the improvement though consumed for temporary uses or structures [52] such as concrete forms,[53] scaffolding,[54] falsework,[55] patterns,[56] plans and models,[57] shanties for workmen,[58] or commissary supplies [59] including board, groceries, and tobacco for workmen,[60] and food for men and teams.[61]

[52] No lien can be enforced against a new building constructed upon the site of an old building, for materials not adapted to use in the new building, furnished to a firm of contractors at a time when they were mere volunteers in demolishing the building, in anticipation of securing a contract for the construction of the new, which, when executed contained a no-lien clause. Craig v Commercial Trust Co. 211 Pa. 7, 60 Atl. 317.

[53] No lien exists upon a building in favor of one who furnishes lumber to make concrete forms, under a statute requiring security to be given "for all materials used in such construction" of a public building. Kennedy v. Com. 182 Mass. 480, 65 N. E. 828.

[54] When the materialman knows that the material is to be used only for the purpose of erecting temporary scaffolding to facilitate the work of the contractor, and it is in fact so used, he has no right to a lien although he may have furnished it on the credit of the building. Oppenheimer v. Morrell, 118 Pa. 189, 12 Atl. 307.

[55] No lien can be enforced against the railroad by one who furnishes lumber to a bridge contractor for the construction of a temporary structure erected for the purpose of supporting the track until the steel for the permanent bridge can be obtained, where the contractor builds the temporary structure on its own account, under a provision of the contract authorizing it to do so as a means of avoiding liability for damages stipulated for delay in completion of the work; for it is held that such a structure is not a part of the bridge, either as contracted for or as actually completed, but remains the property of the contractor, who is entitled to remove it and does remove a part of it. Stimson Mill Co. v. Los Angeles Traction Co. 141 Cal. 30, 74 Pac. 357.

[56] It was held in First Nat. Bank v. Perris Irrig. Dist. 107 Cal. 55, 40 Pac. 45, that the cost of patterns used by a materialman in the manufacture of couplings, and the value of boxes in which they were shipped to the contractor, were too remote from the actual work of construction to permit their cost to be made a charge against the contract price of the work as against the owner, where they were not incorporated into the work but remained the property of the contractor.

[57] It was said in Ames v. Dyer, 41 Me. 397, that the plan of a house, the model of a ship, the molds by which its timbers are to be hewed, may be necessary and even indispensable, but they do not enter into any structure so as to be a part of its materials, and cannot be regarded as within the provision of the statute by which a lien is given to laborers and materialmen. The statute involved in this case provided that any carpenter, blacksmith, or other person who should perform labor or furnish materials for or on account of any vessel should have a lien for his wages.

[58] No lien can be enforced against a railroad for lumber furnished and used in the construction of shanties for persons employed and stables for teams used, by a subcontractor in the construction of the road, under a statute giving a lien for materials "furnished . . . in the construction, repair, and equipment of any railroad." Stewart-Chute Lumber Co. v. Missouri P. R. Co. 33 Neb. 29, 49 N. W. 769.

Nor are materials so used lienable under a statute authorizing a lien against the railroad company for materials delivered for the purpose of construction and erection, for which any such railroad receives a benefit. Luttrell v. Knoxville, L. F. & J. R. Co. 119 Tenn. 492, 123 Am. St. Rep. 737, 105 S. W. 565.

[59] Ibid.

[60] Ferguson v. Despo, 8 Ind. App. 523, 34 N. E. 575, involving a statute providing that all persons who shall perform work or labor, or furnish materials in the way of grading, building embankments, making excavations for the track, building bridges, trestlework, work of masonry, fencing, or any other structure, etc., whether the work or labor performed or materials furnished in pursuance of the contract with the railroad company as owner or lessee, or with a contractor or agent of such a railroad corporation, in the work of constructing or repairing any such railroad or part thereof in this state, may have a lien to the extent of the labor performed or materials furnished.

[61] Carson v. Shelton, 128 Ky. 248, 107 S. W. 793, 15 L.R.A.(N.S.) 509, involving statutes giving lien for supplies for the construction of a railroad; Pennsylvania Co. v. Mehaffey, 75 Ohio St. 432, 116 Am. St. Rep. 746, 80 N. E. 177, 9 Ann. Cas. 305, involving statutes giving lien for materials furnished for or in the construction of a railroad. An analogous case is Dudley v. Toledo, A. A. & N. M. R. Co. 65 Mich. 655, 32 N. W. 884, holding that charges for boarding laborers and teams, and for hay and feed furnished a subcontractor, were not for materials within the meaning of a statute entitled, "An Act to Provide for the Protection of Laborers and Persons Furnishing Materials for the Construction and Repairing of Railroads in This State," and giving laborers employed by and

Likewise, the courts refuse to enforce asserted liens for consumed fuel and lubricating oils,[62] though the Indiana appellate court traveled a tortuous road before it reached that conclusion.[63] However, the contrary view has been commonly taken with respect to explosives consumed in the work.[64]

About the only conclusion to be drawn from a survey of the cases has been practically covered by the few remarks at the beginning. To this nothing will be added beyond the observation that the mechanics' lien law yields few general principles as compared with other subjects, and that decisions on the subject are therefore seldom intelligible except when considered in the light of the statutes and the precise facts involved.

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persons furnishing materials to, contractors or subcontractors on railroads, a right of action against the railroad upon compliance with certain conditions.

[62] Central Trust Co. v. Texas & St. L. R. Co. 23 Fed. 703, holding that the word "materials" in a statute giving a lien to all persons who should furnish fuel or materials to a railroad company, was not enlarged by reason of the use of the word "fuel," and that such a statute did not authorize a lien upon a railroad for lubricating and illuminating oils furnished to it. This case was followed in Waters-Pierce Oil Co. v. United States & M. Trust Co. 44 Tex. Civ. App. 397, 99 S. W. 212, holding that coal and oil furnished to a railroad were not lienable.

So, a lien for the price of lubricating oil furnished for use on machinery in a mill is not authorized by a statute giving a lien for any materials furnished for the protection of any building or any machinery which becomes a part of the freehold. Standard Oil Co. v. Lane, 75 Wis. 636, 7 L.R.A. 191, 44 N. W. 644.

It was held in A. M. Holter Hardware Co. v. Ontario Min. Co. 24 Mont. 198, 81 Am. St. Rep. 421, 61 Pac. 8, 20 Mor. Min. Rep. 518, that there could be no lien upon mining property under § 2130 of the Code of Civil Procedure, for illuminating and lubricating oil and gasolene used for fuel.

[63] It was held in Haskell v. Gallagher, 20 Ind. App. 224, 67 Am. St. Rep. 250, 50 N. E. 485, that one who furnished gas as fuel to a contractor to generate power for the purpose of drilling an oil well, was entitled to a lien upon the well under a statute giving a lien to all persons furnishing material for erecting, repairing, or removing any house, mill, manufactory, or other building, bridge, reservoir, system of waterworks, or other structure. It should be observed that the only question discussed in the case was whether an oil well was a structure within the meaning of the statute, and that no objection seems to have been raised as to the lienability of the fuel. That the controlling question was whether an oil well was a structure was later pointed out in Cincinnati, R. & M. R. Co. v. Shera, 36 Ind. App. 315, 73 N. E. 293, in which, however, the court intimated that a decision in the former case that the fuel was lienable would have been correct, by taking the pains to distinguish it upon the ground that in the latter case the language of the statute involved was that all persons who should furnish any material for use in the construction or repair of any railroad might have a lien to the extent of the work or labor performed; and the latter case holds that under this statute there can be no lien upon a railroad in favor of one who furnished coal to a contractor, which was consumed in the construction of the railroad. But the position of the Indiana court becomes still more complicated by the decision in Mossburg v. United Oil & Gas Co. 43 Ind. App. 465, 87 N. E. 992, holding without discussion further than to say that the Shera Case was controlling, that there could be no lien upon an oil well for fuel furnished to and used by a contractor in drilling the well. Although no statute is cited in this case, and there is therefore nothing to indicate whether the lien was sought under the same statute as that involved in the Haskell Case, the situation is, to say the least, anomalous in which one finds a case which necessarily, even if impliedly, overrules a former decision, and does so without discussion, and upon the strength of an intervening decision in which the same court was at pains to distinguish the overruled decision. About the only explanation is that no question of the lienability of the fuel appears to have been presented in the Haskell Case, and that the case should not therefore be regarded as deciding that point. Haskell v. Gallagher is finally discarded in Niagara Oil Co. v. Beebe, 45 Ind. App. 576, 91 N. E. 250, holding that coal furnished and used in drilling an oil well is not lienable so as to warrant a lien against the well, expressly overruling so much of Haskell v. Gallagher as conflicts with Mossburg v. United Oil & Gas Co., and citing § 8295 of the act of 1908, providing that all persons furnishing materials may have a lien upon the house for which they may have furnished the materials.

[64] California Powder Works v. Blue Tent Consol. Hydraulic Gold Mines, 3 Cal. Unrep. 145, 22 Pac. 391; Giant Powder Co. v. San Diego Flume Co. 78 Cal. 193, 20 Pac. 419; Repauno Chemical Co. v. Greenfield & N. R. Co. 59 Mo. App. 11; Schaghticoke Powder Co. v. Greenwich & J. R. Co. 183 N. Y. 306, 111 Am. St. Rep. 751, 76 N. E. 153, 5 Ann. Cas. 443, 2 L.R.A.(N.S.) 288; Keystone Min. Co. v. Gallagher, 5 Colo. 23, 9 Mor. Min. Rep. 406; Hazard Powder Co. v. Byrnes, 21 How. Pr. 189; Giant Powder Co. v. Oregon P. R. Co. 14 Sawy. 560, 42 Fed. 470, 8 L.R.A. 700; Hercules Powder Co. v. Knoxville, L. F. & J. R. Co. 113 Tenn. 382, 106 Am. St. Rep. 836, 83 S. W. 354, 67 L.R.A. 487.

Effect of Stipulation in Building Contract Requiring Alterations or Extras to be Ordered in Writing

BY WILLIS A. ESTRICH

STIPULATIONS are frequently inserted in building and construction contracts for the purpose of fixing the entire agreement between the parties in writing and avoiding the uncertainties that arise from oral contracts. These stipulations vary from provisions that no extra work shall be done nor any alteration made except upon a written order, to those which provide that no compensation shall be made for any extra work or alterations unless the same has been done in pursuance of a written order. A number of these provisions, with the cases in which they have been passed upon, are set forth in the note below.[1]

A provision that guards very carefully against oral modification is that found in James Reilly Repair & Supply Co. v. Smith, 100 C. C. A. 630, 177 Fed. 168. The contract was for the altering and repairing of a yacht, and it was expressly agreed in the contract that the libelant "should make no claim for extra work and compensation therefor, in addition to the contract price, as hereinafter specified, unless he can show an order for the work, the written approval of the designers, and the price of such work, all in writing; and no verbal agreement and order of any of the parties hereto or their agents shall be set forth by either party hereto to modify this clause, and no waiver of this clause not made in writing and signed by the parties shall be of any force or effect whatever." Under this provision it was held that the mere fact that the owner of the yacht was frequently present during the period when the repairs were being made, consulted with the libelant's employees,

[1] If any alterations are required they must be stated in the contract in writing. Illinois Inst. v. Platt, 5 Ill. App. 567.

Changes or alterations shall be agreed upon at the time made, and the same made note of and signed by both parties to the agreement and attached to the contract. Merchants' Exch. v. Butler, 3 Tex. App. Civ. Cas. (Willson) 375.

No alterations shall be made in the work except upon the written order of the architect. Landstra v. Bunn, 81 N. J. L. 680, 80 Atl. 496.

No change or alteration shall be made in the work as shown and described by the drawings, except upon a written order of the architect, and when so made the value of the work added shall be computed by the architect. Taub v. Woodruff, — Tex. Civ. App. —, 134 S. W. 750.

No alterations shall be made except upon written order of the architect, and the amount paid by the owner or allowed by the contractor shall be stated in the said order. Chicago Lumber & Coal Co. v. Garmer, 132 Iowa, 282, 109 N. W. 780.

No extras will be allowed unless ordered by the superintendent in writing and indorsed on or attached to the contract. Rebekah Assembly, I. O. O. F. v. Pulse, 47 Ind. App. 466, 92 N. E. 1045, 94 N. E. 779.

Nothing shall be considered as extra unless agreed upon in writing and signed. Piper v. Murray, 43 Mont. 230, 115 Pac. 669.

No new work shall be considered extra unless a written order shall have been given by the architect. Bannon v. Jackson, 121 Tenn. 381, 130 Am. St. Rep. 778, 117 S. W. 504, 17 Ann. Cas. 77.

All extra work shall be done by written order of the chief engineer fixing the prices to be paid for the same, and providing that the obtaining of the certificate from the chief engineer shall be a condition precedent to the right of the contractor to be paid for any such extra work. Choctaw & M. R. Co. v. Newton, 71 C. C. A. 655, 140 Fed. 225.

The contractor shall make no claim for additional work unless done in pursuance of a written order from the architect. Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. 280; O'Keefe v. St. Francis's Church, 59 Conn. 551, 22 Atl. 325.

No bill for alterations or additions will be allowed unless ordered in writing. Demarest v. Haide, 20 Jones & S. 398.

and made suggestions which resulted in changes, was not enough to warrant a finding of even an implied agreement to waive the express terms of the contract and entitle the libelant to a recovery for extra work based upon a verbal agreement.

All courts treat such stipulations in building and construction contracts as valid. It does not follow, however, that a failure to comply with the requirements of such a stipulation and obtain a writing prevents a recovery in all cases, for, except in the case of sealed contracts, it is held that such stipulations may be waived or superseded by subsequent oral transactions between the parties. To hold that such a stipulation may not be waived or modified by subsequent oral transactions would be equivalent to giving it the effect of a statute of frauds, and this the courts have refused to do. It has been stated that parties to a written contract of the character of a building contract are as free to alter it after it has been made as they were to make it, and all attempts on their part by its terms to tie up their freedom of dealing with each other will be futile.[2] Again, it has been stated that it does not stand with reason that the parties can by contract preclude themselves from subsequently contracting in any particular way.[3]

It may be admitted that such a stipulation may be waived or superseded by subsequent oral transactions between the parties, but it should prevent any changed liabilities where the only thing that is subsequently done is the thing which by the express terms of the written contract the parties had the right to do without effecting any such change. The courts have been entirely too free in considering such stipulations waived or superseded by subsequent oral transactions between the parties.

A distinction should be drawn between the various forms of these contractual provisions in this regard. A contract providing simply that no extra work shall be done except upon a written order might be considered waived, or the contractor entitled to recover upon oral transactions subsequently taking place between the parties, when upon the same transactions there should be no recovery under a contract which provides that the owner may make any desired change without avoiding the contract and requiring the additional cost to be added to the contract price, and that no bill or account for extra work shall be allowed or paid unless authority for contracting the same can be shown by a certificate from the owner.

The view is taken in one case[4] that a provision in a contract that the owner should have the right to make alterations and the contractor should comply with such as were ordered in writing was intended merely to require the contractor to perform such alterations or extras as were ordered in writing, but not to interfere with his recovery of the price therefor, if he chose to perform them other than upon an order in writing.

With reference to orders by architects and engineers it may be doubted whether a provision that no extra work shall be ordered, or that the contractor shall make no claim for extra compensation unless ordered by the architect or engineer in writing, is intended to apply to an order by the owner, notwithstanding the cases have assumed, rather than decided, that this is the case.

As stated above, the courts sustain the validity of such provisions in a contract and hold that they must control unless clearly waived or superseded.[5] The

[2] O'Loughlin v. Poli, 82 Conn. 427, 74 Atl. 763.

[3] Copeland v. Hewett, 96 Me. 525, 53 Atl. 36.

[4] Diamond v. McAnnany, 16 U. C. C. P. 9.

[5] O'Keefe v. St. Francis's Church, 59 Conn. 551, 22 Atl. 325; Merchants' Exch. v. Butler, 3 Tex. App. Civ. Cas. (Willson) 375; Copeland v. Hewett, 96 Me. 525, 53 Atl. 36; Ahern v. Boyce, 19 Mo. App. 552; Sheyer v. Pinkerton Constr. Co. — N. J. —, 59 Atl. 462; Traitel Marble Co. v. Brown Bros. 159 App. Div. 485, 144 N. Y. Supp. 562; Coorsen v. Ziehl, 103 Wis. 381, 79 N. W. 562; Illinois Inst. v. Platt, 5 Ill. App. 567; Chicago Lumber & Coal Co. v. Garmer, 132 Iowa, 282, 109 N. W. 780; Choctaw & M. R. Co. v. Newton, 71 C. C. A. 655, 140 Fed. 225, certiorari denied in 202 U. S. 620, 50 L. ed. 1174, 26 Sup. Ct. Rep. 765; Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. 280; James Reilly Repair & Supply Co. v. Smith, 100 C. C. A. 630, 177 Fed. 168; Piper v. Murray, 43 Mont. 230, 115 Pac. 669; Landstra v. Bunn, 81 N. J. L. 680, 80 Atl. 496; Bannon v. Jackson, [illegible] Tenn. 381, 130 Am. St. Rep. 778, 117 S[illegible]04, 17 Ann.

theories on which the courts have held such provisions in a contract to be superseded and a recovery allowed in the absence of a written order may be classified as, (1) independent contract,[6] (2) modification or rescission, and (3) waiver. These theories have not always been kept distinct by the courts, although theoretically there is a distinction between them. One court,[7] in speaking of the distinction between rescission and waiver, states that "rescission of a contract is one thing, waiving some of its terms is quite another. Rescission required concurrent action by both parties,—a meeting of minds. A waiver is the act of the party for whose benefit the condition exists. The fact that the other party failed to comply with the condition is no evidence that the party to be benefited by it intended to waive it."

In some cases no particular theory is referred to, the court under certain circumstances allowing a recovery for work done in the absence of a written order therefor notwithstanding the provisions of the contract. It is apparent that some of these courts at least, if not all, have had in mind some theory of avoidance of such stipulations in the contract, but have not so expressly stated.

The theory of alteration, rescission, or abandonment is based upon the principle that parties may alter their contract at pleasure by oral agreements, unless the contract be one which the law requires to be evidenced by writing and signed;[8] that the provision that alteration must be made in writing is not strictly binding upon the parties when both agree to the alteration and change. It is held that a rescission exists whenever the owner has ordered and the contractor agreed to do whatever extra work the parties mutually agree upon.[9] But in one case it is held that where the contractor does not exact a promise of payment as for extra work upon the owner's ordering the change, and does not inform the owner that it will entail extra expense the owner may well infer that no extra charge will be made.[10]

The theory most frequently adopted in avoiding such stipulations in contracts is that of waiver, it being held in a large number of cases that such a provision in a contract may be waived.[11]

The ultimate question in all cases is the effect the subsequent transactions between the parties have upon their rights and liabilities. The answer to this question depends upon the character of the

Cas. 77; Baltimore Cemetery Co. v. Coburn, 7 Md. 202; Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635; Fruin-Bambrick Constr. Co. v. Ft. Smith & W. R. Co. 140 Fed. 465; Taub v. Woodruff, —Tex. Civ. App. —, 134 S. W. 750; Shaw v. First Baptist Church, 44 Minn. 22, 46 N. W. 146; Brunsdon v. Staines, Cab. & El. 272; Howard v. Pensacola & A. R. Co. 24 Fla. 560, 5 So. 356.

[6] Cases in which this theory has been applied are Escott v. White, 10 Bush, 169; St. John's Episcopal Church v. Clarke, 16 Ky. L. Rep. 207; Pippy v. Winslow, 62 Or. 219, 125 Pac. 298; Chicago & E. I. R. Co. v. Moran, 187 Ill. 316, 58 N. E. 335; Shultz v. Seibel, 209 Pa. 27, 57 Atl. 1120; James Reilly Repair & Supply Co. v. Smith, 100 C. C. A. 630, 177 Fed. 168. See also Lewis v. Yagel, 77 Hun. 337, 28 N. Y. Supp. 833; Badders v. Davis, 88 Ala. 367, 6 So. 834, same case on later appeal 95 Ala. 348, 10 So. 422.

[7] O'Keefe v. St. Francis's Church, 59 Conn. 551, 22 Atl. 325.

[8] For cases treating this theory, see Badders v. Davis, 88 Ala. 367, 6 So. 834, same case on later appeal 95 Ala. 348, 10 So. 422; McFadden v. O'Donnell, 18 Cal. 160; Escott v. White, 10 Bush, 169; O'Loughlin v. Poli, 82 Conn. 427, 74 Atl. 763; Baum v. Covert, 62 Miss. 113; Hay v. Bush, 110 La. 575, 34 So. 692; Derrico v. Muller, 142 N. Y. Supp. 479.

[9] Baum v. Covert, 62 Miss. 113—see also McFadden v. O'Donnell, 18 Cal. 160.

[10] Badders v. Davis, 88 Ala. 367, 6 So. 834, same case on later appeal 95 Ala. 348, 10 So. 422.

[11] Wyman v. Hooker, 2 Cal. App. 36, 83 Pac. 79; Charlotte Harbor & N. R. Co. v. Burwell, 56 Fla. 217, 48 So. 213; Elgin v. Joslyn, 36 Ill. App. 301, affirmed in 136 Ill. 525, 26 N. E. 1090; Copeland v. Hewett, 96 Me. 525, 53 Atl. 36; Erskine v. Johnson, 23 Neb. 261, 36 N. W. 510; Guenther v. Moffett, 77 N. J. L. 206, 71 Atl. 153; Abells v. Syracuse, 7 App. Div. 501, 40 N. Y. Supp. 233; Emslie v. Livingston, 51 App. Div. 628, 64 N. Y. Supp. 259; Greenberg v. Mendelson, 49 Misc. 485, 97 N. Y. Supp. 965; Porter v. Swan, 44 N. Y. S. R. 375, 17 N. Y. Supp. 351; Murphy v. Liberty Nat. Bank, 184 Pa. 208, 39 Atl. 143; Davis v. La Crosse Hospital Asso. 121 Wis. 579, 99 N. W. 351, 1 Ann. Cas. 950. See also Expanded Metal Fire-Proofing Co. v. Noel Constr. Co. 87 Ohio St. 428, 101 N. E. 348, and Escott v. White, 10 Bush, 169.

This is the view taken also in Headley v. Cavileer, 82 N. J. L. 635, 82 Atl. 908, 48 L.R.A. (N.S.) 564. An exhaustive note reviewing all the authorities is appended to the report of the above case in 48 L.R.A.(N.S.) 564.

subsequent transactions. It is uniformly held that the mere doing of extra work or the making of alterations will not entitle the contractor to recover therefor in the absence of a written order.[12] This is true where the owner had no knowledge of the alteration,[13] and has likewise been held true where the owner has had knowledge of the alteration.[14] In the latter case the court states that "there is no foundation in law nor warrant in reason for saying that in a case like the present, where a party stipulates that he will not pay for alterations in the work unless they are agreed upon and reduced to writing beforehand, he shall nevertheless be held responsible upon a *quantum meruit*. It would be to deny him the benefit of written evidence and subject him to the uncertainties of parol proof depending upon the fluctuating opinions of other persons as to the character and the value of the work, and to bind him against his will.

But where the owner has made changes in the plan of the building and afterwards received the benefit of the work, the contractor may recover compensation although he is unable to secure a writing because the principal contractor has absconded and the superintendent refuses to give the writing.[15] So, where the city building inspectors have ordered a change in the works, and the architect prepared a sketch of the same and handed it to the contractor, who told the subcontractor to make the change and go ahead with the work, and such subcontractor did so, with the knowledge and acquiescence of the owner, the owner is liable therefor.[16]

Where the owner has ordered the work and agreed to pay for it, the contractor who has performed the same may recover therefor notwithstanding such a stipulation in the contract.[17] Other cases allow a recovery where the extra work is agreed to by the owner, nothing being said as to an express promise to pay, and it is not clear that the word "agree" is used as including such promise.[18]

It is when the extra work or alterations are merely ordered by the owner that the dispute comes as to whether the contractor may recover therefor. A recovery is denied by some courts where the work is merely ordered,[19] while others allow a recovery.[20] Others, while allowing re-

[12] Sheyer v. Pinkerton Const. Co. — N. J. —, 59 Atl. 462; Barker v. Troy & R. R. Co. 27 Vt. 766; Illinois Inst. v. Platt, 5 Ill. App. 567; Rebekah Assembly, I. O. O. F. v. Pulse, 47 Ind. App. 466, 92 N. E. 1045, rehearing denied in 47 Ind. App. 474, 94 N. E. 779; Eldridge v. Fuhr, 59 Mo. App. 44; Sutherland v. Morris, 45 Hun, 259; Williams v. Cornwall Paper Co. 9 Ont. Week. Rep. 111; Walsh v. Howard, 61 Misc. 328, 113 N. Y. Supp. 499; Myers v. Sarl, 3 El. & El. 306, 30 L. J. Q. B. N. S. 9, 7 Jur. N. S. 97, 9 Week. Rep. 96, 14 Eng. Rul. Cas. 656; Tharsis Sulphur & Copper Co. v. M'Elroy, L. R. 3 App. Cas. 1040.

[13] Baltimore Cemetery Co. v. Coburn, 7 Md. 202; Wiley v. Hart, 74 Wash. 142, 32 Pac. 1015.

[14] Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635. See also Nixon v. Taff Vale R. Co. 7 Hare, 136.

[15] Fitzgerald v. Beers, 31 Mo. App. 356.

[16] Cunningham v. Fourth Baptist Church, 159 Pa. 620, 28 Atl. 490.

[17] Badders v. Davis, 88 Ala. 367, 6 So. 834, same case on later appeal, 95 Ala. 348, 10 So. 422; Theis v. Svoboda, 166 Ill. App. 20; O'Keefe v. St. Francis's Church, 59 Conn. 551, 22 Atl. 325; Gehri v. Dawson, 64 Wash. 240, 116 Pac. 673; Copeland v. Hewett, 96 Me. 525, 53 Atl. 36; Derrico v. Muller, 142 N. Y. Supp. 479.

[18] McFadden v. O'Donnell, 18 Cal. 160; Wyman v. Hooker, 2 Cal. App. 36, 83 Pac. 79; Lewis v. Yagel, 77 Hun, 337, 28 N. Y. Supp. 833; Denoth v. Carter, — N. J. L. —, 88 Atl. 835; Theis v. Svoboda, 166 Ill. App. 20; Hay v. Bush, 110 La. 575, 34 So. 692; Molloy v. Liebe, 102 L. T. N. S. 616, 47 Scot. L. R. 909.

[19] Badders v. Davis, 88 Ala. 367, 6 So. 834. Same case on later appeal, 95 Ala. 348, 10 So. 422; Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635; Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. 280; Landstra v. Bunn, 81 N. J. L. 680, 80 Atl. 496, approved in Headley v. Cavileer, 82 N. J. L. 635, 48 L.R.A.(N.S.) 564, 82 Atl. 908; James Reilly Repair & Supply Co. v. Smith, 100 C. C. A. 630, 177 Fed. 168; Simpson v. New York, W. S. & B. R. Co. 19 Jones & S. 419; Franklin v. Drake, 3 Fost. & F. 65, 6 L. T. N. S. 291; Thames Ironworks & Ship Bldg. Co. v. Royal Mail Steam-Packet Co. 8 Jur. N. S. 100, 31 L. J. C. P. N. S. 169, 13 C. B. N. S. 358, 9 Week. Rep. 942.

[20] Escott v. White, 10 Bush, 169; Pippy v. Winslow, 62 Or. 219, 125 Pac. 298; Baum v. Covert, 62 Miss. 113; Crowley v. United States Fidelity & G. Co. 29 Wash. 268, 69 Pac. 784; Gehri v. Dawson, 64 Wash. 240, 116 Pac. 673; Jobst v. Hayden Bros. 84 Neb. 735, 121 N. W. 957, — L.R.A.(N.S.) —; Campbell v. Kimball, 87 Neb. 309, 127 N. W. 142; Meyer v. Berlandi, 53 Minn. 59, 54 N. W. 937; McGowan v. Gate City Malt Co. 89 Neb. 10, 130 N. W. 965; Melville v. Carpenter, 11 U. C. Q. B. 128; Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co. 66 C. C. A. 67, 132 Fed. 957.

covery upon the oral order of the owner, require that the nature and expense of the extra work performed in obedience to the verbal order of the owner and the circumstances attending the order and its execution be sufficient to establish that the parties contemplated and expected that such work should be done and paid for.[21]

So, where the owner has orally ordered work, and, upon receiving a statement therefor, makes a partial payment and acknowledges a balance due according to the statement, he is liable for the work ordered done.[22]

Some of the cases which allow a recovery upon the oral order of the owner seem to require a benefit to the owner from the extra work or alterations in order that there may be a recovery,[23] but that a benefit to the owner is not sufficient to entitle the contractor to recover for work orally ordered done by the owner has been held in at least one case where the owner received a benefit from the extra work.[24]

Some of the other cases, also, which allow a recovery for work done upon the oral order of the owner are decided under facts which make a strong case in favor of the contractor, either on account of the extensive character of the work done,[25] or on acount of a uniform course of ignoring the provisions of the contract.[26]

[21] Emslie v. Livingston, 51 App. Div. 628, 64 N. Y. Supp. 259; Bartlett v. Stanchfield, 148 Mass. 394, 19 N. E. 549, 2 L.R.A. 625.

[22] Clarke v. Harris, 53 Misc. 557, 103 N. Y. Supp. 785.

[23] Escott v. White, 10 Bush, 169; Pippy v. Winslow, 62 Or. 219, 125 Pac. 298.

[24] Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635.

[25] Jobst v. Hayden Bros. 84 Neb. 735, 121 N. W. 957, — L.R.A.(N.S.) —.

[26] Campbell v. Kimball, 87 Neb. 309, 127 N. W. 142; Meyer v. Berlandi, 53 Minn. 59, 54 N. W. 937; Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co. supra.

[27] Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635.

The weight of reason is with those cases which deny a recovery for work done upon a building covered by the contract upon the mere oral order of the owner, where there is such a stipulation in the contract, as the owner should have a right to presume that any alterations or minor changes ordered by him would be included within the contract price unless he expressly agreed to pay extra for the same, or from the nature and extent of the work ordered it is apparent that the parties contemplated and expected that such work should be paid for as extra.

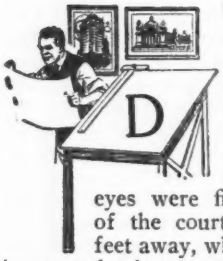
One court[27] in summing up the law states that "it makes no difference if the extra work was ordered by the owner, provided it was on the mill. As we have said, the builder need not accede to the owner's views; he may refuse, or he may assent, under the protection afforded by this clause. If extra work be done without it, the right to additional compensation is waived. Any other interpretation of such words would make them valueless to the parties. The appellee's view, if adopted, would deny to the owner the privilege of suggesting any—the most trivial—alteration of the work, without incurring the risk of opening the whole contract; then the written agreement would be substituted by a mere *quantum meruit* claim for work and labor, to be afterwards adjusted upon uncertain oral testimony. And in many cases his mere presence on the premises might subject him to extra charges, on the ground of acquiescence in alterations made by the builder, when it might well be supposed that there was to be no additional charge, because not previously attached to the contract." The view taken in this case is so obviously sound that it is strange that any courts have departed from it.

Willis A. Estrich

The Unhearkened Verdict

BY HENRY H. DINNEEN

Of the Baltimore Bar



DUNCAN Raybold drummed on the desk with the fingers of his right hand, his eyeglasses twirling about the thumb of his left. His eyes were fixed on the stack of the courthouse, a hundred feet away, which belched smoke in great clouds some three floors beneath his office window, fifteen stories above the ground.

The clock on the bookcase ticked away a full minute before he turned his head, and, fixing his eyes with a cold, impersonal stare upon the man sitting in the mission chair facing him across the desk, grunted out with sudden emphasis:

"So you say you're guilty, Matthews, and you're not sorry for it? Pretty mess, isn't it?"

The man across the desk stared at the lawyer's face for several seconds in silence. He was a young man, nearing his thirtieth year, well set-up and muscular; the lean face was clean shaven, disclosing a rugged jaw, with prominent cheek bones, and a ruddy, healthy complexion; his black hair, curling back, disclosed a broad forehead and a pair of friendly, hazel eyes, now clouded with worry and apprehension. The thin lips closely shut over his teeth emphasized the harassed expression which at the moment characterized his eyes. Between his knees the man twirled backward and forward, with quick, nervous jerks, a soft felt hat with the initials "C. T. M." stenciled in the band.

"Mr. Raybold," and the voice was resonant, low pitched, but vibrant with passion, "there was nothing else for me, or any other man, to do," and the words were emphasized by a sharp rap on the table. "You say that I am guilty—that I killed him; I know it. I didn't come here to discuss that. That would be an idle waste of your time and of mine. I came here because—well, because I didn't know what to do. I want your advice; I can't and won't ask your assistance now, though I may have to later."

"Advice?" and the tone of the lawyer was one of surprise. "Advice concerning what? Grace has been dead a week, and I have not heard that anyone, much less you, has been charged with killing him. You don't need a lawyer, now, man, though you may need a minister for your conscience's sake."

The face across the table fell for a second; then Matthews looked up. "You don't know the whole truth of the matter, counsel," he answerd quietly. "I'll begin at the beginning and tell the whole story if you care to listen—and then you'll see what I need," and Matthews paused expectantly.

Raybold glanced at his desk pad.

"It's wasting your time and mine, but I can give you fifteen minutes. Fire away;" and the lawyer slipped down in his chair, slid his glasses over his left ear, and, extending his arms on the desk in front of him, locked his fingers with deliberation and stared intently at the man who faced him.

Matthews coughed, cleared his throat audibly, and settled down in his chair, crossing his feet and perching his hat on his knee. He began to speak in a low, dull voice, as though recounting the details of some impersonal event the details of which he had committed to memory.

"There is only one explanation of this whole matter, counsel. You knew Jim Grace; so does a certain part of this town's population. He had money, social position, and an established business—if you call the law a business," and the speaker's face twisted into a wry grin. "What you don't know is that Grace

knew Myrtle Rhodes—Rhodes that was, it's Matthews now; she—but there isn't any use in bringing her into this matter any deeper than she already is—she was until Sunday a stenographer in the office of McIlvaine, Grace, & Valentine, Jim Grace's firm, you know."

The lawyer nodded his head without taking his eyes from the speaker's face.

"Well," and Matthew's voice was hard and cold. "Grace may have been a social lion, but at the same time he was a mongrel and a jackal. I killed him because he was a dog," and the speaker paused for a moment to run his hand through his hair reflectively. "I guess I had better take a fresh start, Mr. Raybold," he added apologetically; "I can't think of this business without losing my head, and that won't do if you are to have the facts."

The lawyer nodded again.

"Miss Rhodes and I had been engaged some six months prior to Grace's—death," and the voice was uncertain and hesitating. "We were waiting only the final action of the Yula Valley Company, out in Nevada, on my contract with them, to get married. That contract came Saturday; we were married Sunday, the day Grace was buried."

"Yes," rapped out Raybold impatiently, "but what's that got to do with this case?"

"Everything," Matthews replied, quickly, sharply. "A month ago Grace told Miss Rhodes—she was his private stenographer, you know—that he himeslf was going to be married, and asked Myrtle to join him in a toast to the bride to be. She drank the toast in ice water; but by God! though apparently nothing but water, that one drink threw open to Grace the opportunity he had long been seeking. He hurried her into his car on pretext of her being taken suddenly ill, saying he was going to stop at the hospital and then take her home. She got home at 4 o'clock the next morning, no memory of anything that transpired between the time she left the office, when she clicked glasses with Grace."

The speaker paused, the sweat standing out on his brow, his eyes blazing, and the fingers of his hands trembling.

"You understand, Raybold, you understand?" and the voice rasped with unsuppressed fury.

The lawyer closed his eyes, unlocked his fingers, and the nervous tattoo on the desk began again. "Of course, Matthews—of course. The law," he added quietly, "could have reached Grace and forever damned him, his name, his career—everything, and—"

"Yes, and her name would have been dragged down with his," and Matthews was on his feet, hammering on the desk with clenched fist. "There was only one way, Raybold," and the voice sunk to a low, metallic whisper, as though the speaker feared he would be overheard. "Grace knew one thing, Myrtle knew it, I knew it; that no one else should ever know it, that the wrong might be righted, I figured could be accomplished only by his death. So I killed him; and now, Raybold, what I want to know is this, whether, in view of all these things, I should quit town and go West. They may arrest me, and they may not,—but Grace's partner McIlvaine suspects me, I guess, if nothing else."

"Why?" the lawyer's voice was sharp, incisive.

Matthews smiled grimly. "Simply because I was fool enough, one night three weeks ago, to tell Grace in the lobby of the Palace Building that I had an account to settle with him," replied Matthews, slowly. "McIlvaine was in the 'phone booth in the corner and probably overheard what I said, though he may not have understood it."

"And what did you say?" the lawyer's tone was curious.

The blood mounted slowly to the other's face and he flushed painfully. "It wasn't exactly what I said," he began, painfully, "but it was the way in which I said it. I wanted to hit him, but, like a fool, didn't; simply slapped my hand on my hip and told him that he had better prepare to hide his shame in hell, or words to that effect."

Matthews paused, wet his lips, and, diving into his pocket, produced a bunch of keys. Slipping the ring over the little finger of his left hand, he swung it around swiftly with quick, nervous jerks of his wrist.

"The Wednesday after that," he continued, "they found Grace between the front wheels of his car at the entrance of his office building. You read about it?" and the eye flashed the question.

Raybold nodded affirmatively. "Of course, but nobody except yourself seems to know exactly how it happened."

Matthews started uneasily, glanced hurriedly at the closed door, and then at the clock. Drawing a deep breath, he spoke, soberly, quickly. "I followed Grace all that day—that night. When he left his club and drove to his office, I followed in a taxi. I got out of that on the plaza when I saw him bring his machine to a halt and switch off the headlights. Five minutes after he had entered the lobby of the Palace, I was in the *tonneau* of his car. I first tied down the cut-out, the muffler exhaust, climbed into the back seat and covered my knees with the robe. There I waited three mortal hours, expecting my man to show up at any minute. I had figured the whole matter out carefully, and was prepared to act and act quickly. At last he came out of the building, buttoning up his overcoat as he came across the pavement. He stepped in front of the machine, lit the headlights, and then came back to the wheel, threw the battery coil on, and stepped out in front again to crank up. I watched his every movement, unimpeded by the wind shield, which was folded down upon the dash; my gun was in my hand and I crouched down on the floor, the revolver resting on the seat in front of me, my body concealed in the shadow cast by the top. As he turned the engine over the third time, the exhaust let loose like a rapid-fire gun. Grace straightened up; there was a puzzled look on his face as he stepped back into the beam of the left light. You could not distinguish the report of my revolver from the exhaust. As he fell in a crumpled heap on the pavement, I stepped out of the machine, on the car tracks in the street, and swung into the alley. The gun went down a sewer and I walked down a block, got on a car and went home," and Matthews drew a long breath.

The room was silent for a full minute. Matthews, with closed eyes, was running his right hand through his hair in a nervous, distracted manner, and gripping the arm of his chair with his left, the keys dangling from his finger, while Raybold sat drumming energetically on the desk, his eyes fixed upon the monotonous shelves of books which lined the wall.

"It's a nasty situation at best," he said. "Was it your own gun which you used, or did you buy or borrow one?"

"I got it at Aldred's," Matthews replied.

"Then, of course, they've got the number," snapped Raybold quickly. "It is all day with you if they find that gun, you understand—and what did you say you did with it?"

"Chucked it into the sewer in the alley beside the Palace Building; its in the river by now—they'll never find it," said Matthews confidently.

"Don't bank on that," was the short reply; "what about the taxi driver? How long did he hang around the plaza—don't know, do you?"

"Oh, he left within five minutes after I paid him; his meter was out of whack and he paused under a gaslight to fix it; I saw him drive off before Grace entered the building. There's nothing in that," and the speaker's tone was one of confidence.

"Don't bank on that either," Raybold cautioned, "though I don't see how they can supply any motive even though suspicion is directed at you. That is, unless, of course they go after your wife—"

"Myrtle won't talk—that's certain," broke in the other.

"Well," continued the lawyer, seemingly taking no notice of the interruption, "you want my advice. Before I give it, I'm going to sum up the situation. Flag any errors I make."

Matthews nodded.

"First, the police will look up Grace's private life; nothing found; then his professional career; nothing much found, other than that McIlvaine heard an idle threat some month or so ago. Here you, the threatener, come in. They look you up and learn that since that threat was made you have married the dead man's stenographer. Then they dig a little deeper into the office habits and conduct of Grace; up crops the event of a month

ago,—the unexpected departure of Grace in his machine with his stenographer taken suddenly ill. Mark you, I am following this line because they will seek to couple you and your threat with a motive for the killing. The trail ends at the curb in front of the office building; Grace is his own chauffeur; no one knows where he went except Grace and Miss Rhodes,—Mrs. Matthews, I mean," added the speaker hastily. "He didn't go direct to her home, nor to the Mercy Hospital either—inquiry there with a photo of Grace and a glance at the records would establish that. * * * Then they take the girl, your wife, in hand; you say she will not talk of what happened on the night her employer drove off with her in his machine?"

"I said so," and Matthews' voice was cold and low.

"Good. They take up the trail behind you. The threat, the absence of any known enemies of Grace, would make the police grab at straws in a matter of this kind. Where were you that night? The authorities can learn nothing. You left your apartment at 7:30; no one saw you return. You were not at the Amalgamated Engineering offices,—the janitor tells them that, at any time between 8 and 11. I know they will ascertain that because we know where you were. You were not up town at Miss Rhodes' flat. We know that, and they will learn it in some way—no matter how; servants and others talk—for a price. You were not at your club; maybe you were at the theater. Such unexplained absence would certainly be the father to an anxious suspicion. The net tightens. You have no *alibi*, you have threatened the dead man, and married his stenographer. Let's summarize the situation: The man who, three days after Grace's death, marries his stenographer had been heard to threaten the dead man a month before; diligent search and inquiry fails to reveal that man's whereabouts on the night of the crime, and the woman who is his wife will throw no light on Grace's personal affairs. Suspicion will become certainty if by any accident they find the taxi driver or the gun. I am inclined to believe that even now they may be watching you, so it would serve no good purpose to leave the city at the moment; they would certainly bring you back if they indicted you—and flight wouldn't help your case before a jury. That is all I can say now—but if the worst came to the worst, what defense would you rely on?"

"I don't see that I have any" was the response in a dull, impersonal tone.

"Of course," continued Raybold, "there is the weakness of the state's case; purely circumstantial at best, the extent of which, however, we may not appreciate until they rest. Of course, there is behind all of it the real cause of this shooting; insanity mayhap by reason of a mind unbalanced by shock and anger; that defense might go here in Maryland, and it might not—"

"Forget that," broke in the other harshly. "Neither you, nor I, nor any other man shall bring her name into this mess. I killed him, I tell you I killed him, to hush this matter up; I won't hide behind any woman's skirts, much less my wife's, to save myself. I won't admit to anyone that I did it; I won't explain to anyone why I did it if they succeed in connecting me with the shooting. I killed him to shut his mouth, and I am going to keep mine shut if they kill me for it. There are some things that to me I dread more than death, and—"

"Well, plead guilty, then," interrupted Raybold, "they never give you the limit here, you know, if you do that."

"And be cooped up like a caged bird for the rest of my life—bah!" replied Matthews, getting upon his feet and settling his hat firmly upon his head. "They may prove that I might have killed him; they can't prove why he was killed—and I think I'll take my chances with the jury," he finished stoutly.

"You are a fool, man," said the lawyer testily. "If they indict you, and you maintain the same stubborn, defiant attitude that possesses you now, I tell you frankly you haven't one chance in a thousand; they won't return a true bill against you unless the state has some evidence, and you have got none. I've known you a long time, Matthews, and I am not going to see you railroaded without a fair trial; but you understand, here and now, that I won't be answerable for

the consequences if I am compelled to try this case according to your views and regardless of mine. You understand that?"

"I do," answered the other, slowly; "I appreciate your position, but I have figured the whole thing up. I gave Grace his medicine for silence, and I will take mine in the same way. I didn't come here to discuss any defense I might have; I simply wanted your advice as to the best policy to pursue; you have given that, and I am content;" and the speaker opened the door, and, with a cherry "Good-bye," stepped out into the corridor.

* * * * * * *

Ten days later a true bill was returned by the grand jury, charging Cloyd T. Matthews with murder in the first degree in causing the death of James F. Grace.

A phone message from the office of Duncan Raybold brought a deputy sheriff across the street from the courthouse with the bench warrant. Matthews was in Raybold's private office, gazing at the city sky line to the north, twirling his hat in his hands.

Raybold took the paper from the officer's hand and read it carelessly; then he tossed it across the desk to Matthews. "It's in proper shape, boy; there's nothing to do but go quietly with our friend here—and keep a stiff upper lip over a close mouth."

That night Cloyd Matthews slept in the city jail.

* * * * * * *

The state's case was well under way. The chain which it had woven about the dark-haired, muscular young man sitting silently behind Duncan Raybold, was seemingly complete. The prison pallor had touched Matthews' face, his hands, his wrists; but no fear, no apprehension, no appeal for mercy was voiced by any of the numerous changes of expression which his face underwent. The prisoner had grinned rather sheepishly at McIlvaine's recital of the passage between Grace and himself; had chuckled audibly as the witness endeavored, under cross-examination, to "squirm" out of the admission that he had at that time been acting the conscious eavesdropper; his face had retained its immobile, impersonal expression as Lawrence Malloy, the driver of taxi bearing license number 68,923, had, after a cautious scrutiny of the traverser, identified him as the man who had gotten into his machine at Union Station and directed the witness to follow the heavy touring car ahead bearing tag 53,247, already identified as the license on Grace's machine; stared placidly and without batting an eye as the witness described how his fare had alighted on the courthouse plaza, and how he, curious, after having stopped his car to fix his meter, had run it around the corner and crept back to see Matthews disappear behind Grace's machine. Cross-examination failed to shake the witness, and seemingly only emphasized the importance which the defense seemed to attach to his testimony.

The expression on the traverser's face changed slightly as Warner MacKenzie, a salesman in Aldred's, the city's leading sporting-goods house, took the stand. Witness and accused had known each other for years, and it was with obvious reluctance and misgiving that the witness took the oath. The prosecuting officer, having elicited MacKenzie's occupation, handed him a heavy, sawed-off, bulldog type revolver, the barrel and cylinder of which were covered with rust, while the horn handle was tinged a mottled green.

"I hand you a W. & J. .32 caliber, five-shell revolver; you are familiar with that model?"

"I am," responded the witness.

"Tell us the number of that gun, then," and the prosecutor paused with pencil in midair, while the foreman of the jury leaned forward and stared intently at the witness.

MacKenzie, turning the weapon charily in his hand, rested it on the arm of his chair, and, taking a small instrument from his pocket, deftly removed the screw securing the handle.

"Its No. 1,370,162, sir," he said.

"Now, Mr. MacKenzie, turn to the record of your company's sales for last November and tell us whether that weapon was sold by your concern?"

"Objected to," said Raybold, on his feet; "they have not connected this ex-

hibit with the crime charged in the indictment."

"The state may," responded the court; "if it does not, I will strike out the testimony of this witness; meantime, let it stand subject to exception. Go on, Mr. State's Attorney."

The witness stepped down and over to the state's table, picked up a square book bound in corduroy and edged in red leather, and resumed the stand.

"Revolver W. & J. No. 1,370,162/1910 was sold by me on November 29th last; the price was $4.75."

"And the purchaser was?"

The witness hesitated, cleared his throat with a nervous cough, and, glancing straight at the foreman of the jury, said in a low tone:

"Cloyd Matthews."

"You are sure it was the traverser?"

"Yes, there can be no mistake; I have known him for fifteen years."

"Witness with you," said the prosecutor, shortly.

There was a hurried consultation between Raybold and Matthews, the lawyer leaning over the back of his chair to whisper in the ear of the man on the bench behind him. Raybold then turned, leaned back in his chair, and gazed intently at the witness for a full minute, and then, waving his arm towards the rear of the court room, said simply:

"No questions."

The final witness for the state, one George L. Rogers, testified briefly that he was in the employ of the city sewerage department; that the week of December 5th he had investigated the cause of the "backing up" of a city sewer in the alley adjoining the Palace Building, opposite the courthouse; and that in a 3-inch vent pipe in the sewer he had found the revolver identified by MacKenzie; that it was the center of a snarl of rags, paper, string, and rubbish, which clogged the pipe, and that when he found it it was in the condition as then exhibited; rusted, with four loaded shells wedged in the cylinder, one chamber discharged. Cross-examined, he said that he had delivered the weapon to the police authorities because he recalled the unexplained death of Grace within a block of the sewer and the fact that a .32 caliber ball had caused his death. No, he did not know, in fact had never seen, the traverser before the trial began. Raybold then excused him.

The prosecutor arose to his feet. "The state has, I think, proved all facts relevant, but the motive," he began; "we will have but one more witness; and the clerk will call Myrtle Rhodes Matthews."

A slight, black-clad figure, with veiled face, arose from one of the rear benches and started towards the stand. Raybold, on his feet when the name reached his ears, waved her back with a gesture.

"If the court please, on behalf of the witness and of the traverser, we submit that this witness should not be called by the state. She is the defendant's wife," he added, simply.

The court paused in the act of tearing legal cap into strips, pushed his spectacles up on his forehead, and peered down at the state's table.

"What's the object of this, Mr. Lane?" The tone was querelous.

"The motive, your Honor; this witness, this girl, was Mr. Grace's stenographer and—"

"You have proved that she is; likewise she is the traverser's wife. I do not understand you to take issue with traverser's counsel that she does not desire to be called. Under these circumstances, you must not say what you think you might be able to prove by her," rasped out the voice from the bench. "Objection sustained."

"The state rests, then," Lane retorted, and sank into his chair with a grunt.

"The defense likewise rests," said Raybold, after a brief whispered conference with Matthews; "but we would ask the court to inform the jury that, in this case —and in this state, they are the sole and exclusive judges of the law and the facts, and that it is their province to determine both in arriving at their verdict."

"The jury will be so informed," answered the court, shortly; "go ahead, Mr. Lane, with your argument," and the judge tore a long strip from the pad before him.

The jury had been locked up for the night. At 9:30 the next morning the bailiff brought word to Judge Davis's chambers that they had agreed, and as

the clock in the city hall boomed 10 the twelve men filed in silently. The court bowed curtly to Lane, to Raybold, to the jury; apparently, he did not see the traverser at the table, his head bowed upon his arms.

The atmosphere in the room was oppressive, and seemingly charged with some nameless dread as the gray-haired clerk called the roll, the bailiff intoning the juror's number as each man responded.

The clerk stood up, the indictment in one hand, the other supporting his aged frame against his desk.

"Gentlemen of the jury," he began, "have you agreed upon a verdict?"

"We have," was the response of the twelve, speaking as a unit.

"Who shall speak for you?" Continued experience had rendered the tone dull and monotonous.

"Our foreman," came the answer.

"Cloyd T. Matthews, stand up; traverser, look upon the jurors; jurors, look upon the traverser. Is Cloyd T. Matthews guilty whereof he stands indicted, or not guilty?"

"Guilty of murder in the first degree," said the foreman in a low voice.

A shuddering sigh swept over the room; Matthews stood motionless, with blanched face, gazing at the court; the clerk was noting down with cramped fingers upon the docket before him the words of the foreman. Raybold rose slowly to his feet, his eye resting first on the jury, then on the clerk, finally on the court.

"For reasons apparent upon the face of the record and hereafter to be more specifically designated, the traverser at this time objects to the discharge of the jury and moves—"

"Surely, you are not serious, Mr. Attorney?" and the court leaned over his desk and hammered vigorously with his gavel on the marble edge, while he stared with incredulous eyes at the face of the lawyer below him. "These men have been here, away from their homes, for five days," he went on; "doubtless they slept not last night. You may note your objection and reserve the point, but for humane reasons I rule against you; Mr. Clerk, record the verdict and discharge the jury with the thanks of the court," and he nodded in the general direction of the box. "Meantime, the traverser will be remanded until 3 o'clock—that will give you time to prepare your motions, Mr. Raybold?"

The lawyer bowed his assent and, turning, picked his portfolio and hat from the table, walked around behind Matthews, and patted him on the shoulder.

"Don't give up, boy," he said huskily; "it's always darkest just before dawn, and I am beginning to see the light," and the side door into the witness room closed behind him; through another door and he was hurrying down the corridor in the wake of a group of the discharged jurors.

The hands of the clock on the wall pointed to 5 after 3 when Judge Davis again ascended the bench in part 1 of the criminal court. A maudlin crowd hovered in the rear of the room; the jury box yawned vacuously; the old clerk's pen spluttered across the docket. Lane was in his seat, Raybold in his, the traverser between them.

"The court would be glad to hear from counsel why sentence should not be passed now," and the judge removed his spectacles and slid lower in his chair, his knee braced against the top of the desk.

Fingering a sheet of yellow legal cap, Raybold walked slowly to the far end of the state's table, and, resting his knuckles on the polished wood, looked the court soberly in the face.

"The traverser in this case, sir, does not ask and does not want a new trial. I am, therefore, not going to burden the court with a discussion of the weight or sufficiency of the evidence to sustain the finding of the jury. I ask simply that the court bear with me for a few minutes while I outline as briefly as I can consistently do so the reasons for the motion of arrest of judgment which, for the court's information, simply moves that judgment be arrested and the traverser discharged for the reason that—"

Lane jumped to his feet with a snort of derision. "You asked that of the jury, too," he sneered.

"Just a moment, Mr. Lane," the court's tone was icy; "a man's life may hang here in the balance, and, though I do not

think our friend is serious, nevertheless we must accord him every courtesy. Now, Mr. Raybold, I will hear you," and Davis leaned back in his chair.

"Serious?" retorted Raybold with a grim smile. "I never was more serious in my life. Over our objection, your Honor this morning discharged the jury in this case, and they have now dispersed beyond recall as the jury in this case; in doing this, your Honor discharged the jury before the verdict was properly recorded. When the clerk received the verdict, he said nothing. It is the first time in my experience in fifteen years that 'Uncle' Dan Malone has failed with his time-honored formula after the jury has announced its finding. We all know it, we have all heard it so often: 'Gentlemen of the jury, hearken ye to your verdict as the court hath recorded it. You say by your foreman that you find the traverser guilty of murder in the first degree and so say you all now?' but Mr. Malone forgot it this time; didn't you, Uncle Dan?" and Raybold smiled at the gray head over the docket.

The old man's jaw dropped and his eyes widened; the pen fell from his shaking fingers to the floor unnoticed. "I don't know, Duncan; I don't know; I don't remember—I am growing old," came in trembling accents, and the gray head turned towards the court, apprehension in his eyes.

"You did forget, Uncle Dan, this once," said Raybold, quietly, "and you know it, and the court knows it, and Mr. Lane here knows it, and I know it," and the speaker paused to glance at the face of the prosecutor, whose sneer had vanished to be replaced by a harsh frown, hands clenched on the arms of his chair, staring with cold, unbelieving eyes at the trembling clerk.

The court's head rested on his shoulder; both eyes were closed, the shaggy brows bent in a frown. The clock ticked away for a minute; then Davis's eyes opened slowly and rested upon Raybold.

"Go on, sir," he said; and his eyes closed again.

Raybold stepped over and laid the yellow sheet on the open docket in front of Malone, and then returned to his place.

His voice was even, impersonal when again he spoke: "If the court please, my formal motion has been filed. To sum up, I need say but little. The indictment in this case is in proper form, charging first degree and second degree murder, as well as manslaughter; each count, therefore, would have supported a verdict. The jury, finding premeditation, returned a verdict of first degree; their finding was in proper form, and was a proper verdict, not being open to the objection that it was too general. Having a proper indictment, and a proper forum with jurisdiction, jeopardy attached when the jury was sworn; jeopardy culminated when the verdict was announced. The verdict was one that would, if it had been properly received and recorded, have sustained any judgment warranted by law which this court might have pronounced. But, through no fault of the jury and over the objection of the traverser, the court suffered the jury to disperse before they were polled or requested to 'hearken to their verdict.' This omission by the court itself, in that the clerk is its hand, is fatal in a criminal case, and thereupon I submit that the judgment should be arrested. I refer your Honor to the cases of Arnold's Trial, 16 How. St. Tr. 695; Re Dawson, 13 How. St. Tr. 451; Givens v. State, 76 Md. 485, 25 Atl. 689; State v. McCormick, 84 Me. 566, 24 Atl. 938; Reg. v. Meany, 9 Cox, C. C. 231, Leigh & C. 213, 32 L. J. Mag. Cas. N. S. 24, 8 Jur. N. S. 1161, 7 L. T. N. S. 393, 11 Week. Rep. 41; Farley v. People, 138 Ill. 97, 27 N. E. 927; Guenther v. People, 24 N. Y. 100; State v. Sutton, 4 Gill, 494, and Stuart v. Com. 28 Gratt. 950,—an analysis of all of which cases will, I think, convince your Honor that in view of the proceedings here to-day the traverser is entitled to be discharged."

The court began to speak slowly, deliberately. "As I understand the law, you cannot try a man again after there has been one verdict,—unless, of course, he moves to set aside the verdict and requests a trial *de novo*. If, however, he elects to claim that under the verdict of a jury, properly impaneled and properly presented to the court, he has achieved certain rights such, for instance, as former jeopardy or former

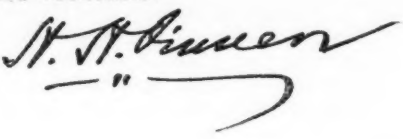
acquittal, my belief is that the court and the state are bound thereby. I am not unfamiliar with the authorities cited by counsel for the defense, and I believe his point, in view of his objection made in open court this morning before the jury dispersed, is well taken. It would be useless," he continued slowly, as though choosing his words with care, "to reserve a matter of this kind for future disposition. Mr. Raybold's recollection coincides with my remembrance of the manner in which the verdict was received. This can, if need be, readily verified by the minutes of the stenographer,—but you will concede it, won't you, Major Lane?"

The prosecutor nodded a sullen assent.

"In view of what has transpired here to-day," the court continued, leaning over the edge of his desk so that the clerk would catch his words, "the technical omission is fatal and operates to stay the hand of the court; there is, then, nothing for the court to do but to sustain the motion in arrest, and, as the traverser has been once in jeopardy, the clerk will make the entry and discharge the traverser without a day."

For five minutes the court sat with closed eyes, drumming on the pad with his gavel. He reopened them on a room empty save for the old clerk nodding in his chair.

"And prominent authority has it," he commented bitterly in a low tone, as though speaking to himself, "that 'law is the perfection of reason, and that which is not reason is not law.' Faugh and fiddlesticks!"



Did You Ever?

Did you ever try a case in court,
When you could but depend,
Upon the testimony,
Of one you thought your friend,
And when you put him on the stand,
And asked your questions nice,
He stripped the hide right off your case,
In one neat little slice?

And did you ever try a case,
Depending on the Law,
As you had found it in the books,
Supporting without a flaw,
And when you came to argue,
Your case before the Court,
Your opponent smiled, and slyly gave,
A most contemptuous snort,
And when at last you'd finished,
The argument you prized,
The fellow across the table,
Looked up as though surprised,
And said, "Your Honor, such was the law,
But the Law has been revised."
And then he read to his Honor,
A statute bright and new,
While you prayed the floor to open up,
And kindly let you through?

Don't answer if it pains you,
But again, I ask, "Did you?"

—GEO. A. JOHNSTON.

The Trust Problem in the United States

The Amendment of the Sherman Anti-Trust Law

BY PAUL H. DITZEN, A. M., LL. B.

Of the Kansas City (Kan.) Bar

[Ed. Note—This is the fourth instalment of Mr. Ditzen's comprehensive serial on the Sherman Anti-Trust Law and its Interpretation.]

AFTER having reviewed the trust problem, the Sherman anti-trust law and its interpretation, and the economic effects produced by the statute, we are now in a position to say whether this law should be amended; and, if amended, how public interests would be subserved thereby.

Most intelligent men believe that the law should be amended. However, there is a divergence of opinion as to the question, "On what theory can a successful program of remedies for the trust problem be established?" Some few will favor the present method pursued by the government,—that of splitting up the combination into its constituent companies; some favor Socialism, many of whom do not comprehend it; then, there are a vast number of business men and statesmen who believe that relief can best be brought about by governmental regulation. It is well to analyze these fundamental theories and to determine which is the most practical.

The So-called "Trust-busting" Program.

The Federal government has pursued this policy with great vigor during the last decade. Experience shows that the efforts put forth have been futile in bringing about a permanent solution of the trust problem. The trusts have not been annihilated. Competition has not been restored. While illegal trusts and combinations should be punished, still it is evident to all that little is accomplished when the courts declare a certain form of combination unlawful, and the managers of such a combination are able to turn around and do the same business in a different form. This method has been tried and found wanting, and should be discontinued.

Socialism.

The Socialists favor government ownership, and thus hope to cure the evils of the body politic. They would have the state own and control these combinations, and the people share in the profits. The theory is beautiful, but the practical working out of the theory is difficult.[1] Government ownership has been successful in some respects. Many cities own and operate their gas and water plants. The Federal government owns and manages the Postoffice Department with economy. In European countries government ownership of transportation has been successful.

However, we are confronted with great difficulties when we recommend that the state should own and control the railroads and all the great manufacturing and mining industries of the United States. In the first place, how would the government get the control of these industries? The cost would be immense. If they were bought the American people would have to pay an eternal tax to the capitalists and their descendants. A radical socialist proposes that

[1] Clark, "The Problem of Monopoly," p. 119.

the government take possession and assume control without considering the owners at all. The effect of such a policy is evident. The right of property has ever been considered inalienable in America. Revolution would follow surely and swiftly.

Another objectionable feature of Socialism is that it tends to destroy the individual initiative. The American citizen has been characterized by his ingenuity in invention and his energy in promoting industry. Were he made an insignificant factor in a great system, with his powers limited, his ambition would be quenched.

Socialism cannot eradicate human selfishness. Even though the government should assume control over these industries, there would be many unscrupulous men who would practise political corruption for self-aggrandizement and personal gain. Human nature has not yet been sufficiently reformed to prophecy the success of Socialism.

Governmental Regulation.

Regulation is the slogan of those who would thwart the evils of capitalistic combinations, and at the same time preserve their powers for good. Those who advance this theory realize that large industrial combinations have come to stay and have established themselves as inseparable from our present economic life. It is proposed to present a program of remedies based on the theory of governmental regulation. The purpose of the proposed program is to preserve the good qualities of the industrial corporations and to check their evils. The chief features of the law should be retained and specific criminal acts should be defined. A constructive program including Federal incorporation and the establishment of an industrial commission is proposed.

The Law Should Not Be Repealed.

The Sherman anti-trust law should not be repealed. Some of its provisions are good and should be enforced. Monopolies have always been considered dangerous to a Republic and a menace to public welfare. The Sherman anti-trust law embodies in a statute a principle that was long recognized in England. Monopolies which are productive of evil results should be declared illegal. The individuals who use monopolistic powers for personal gain and the oppression of the public should be punished by criminal indictment. If such a law is enforced we shall not see the amazing spectacle of a man like James A. Patten getting a corner on the wheat market, and forcing up the price of bread, and thereby creating the evil which was felt at a million firesides.

The men who establish monopolies and unreasonable restraint of trade, which prove to be injurious to the public, should be liable to criminal indictment and punishment. For if there is no criminal punishment by imprisonment, these men will risk the spending of a few thousand dollars as a fine if they can carry on a game by which they can rob the people of millions. While the statute should not be repealed, it should be made more definite and certain; criminal acts should be more specifically defined. The following recommendations are made regarding this:

1. Test of illegality.—The words, "unreasonable or undue restraint of trade," as defined by the courts, while giving the statute a satisfactory interpretation, are very loose and difficult of application. After all, the matter of determining whether a certain contract or combination is a violation of the law depends upon the courts. There ought to be some fixed standard by which business men could measure their actions and thus prevent law-breaking and litigation. It has been suggested that a combination acquiring 50 per cent of the business of the article manufactured would be a monopoly and therefore illegal. It is a difficult matter to set up a standard, but it would seem that the one suggested would be fair. A safe criterion would surely be arrived at after due investigation and deliberation in Congress.

2. Stock watering.—The statute should also declare stock watering illegal. The capital stock of a corporation should represent its earning capacity. Some contend that it should represent its actual physical properties. But the former idea seems most rational. If a corporation declares that its stock is greater than its capacity warrants it should be liable to punishment.

3. Stock holding in other corporations.—One corporation should be forbidden to hold stock in another. The function of a corporation is to create an entity through which certain individuals may carry on a certain kind of business. When it is permitted to hold stock in another corporation the result is that competition is stifled and concentration is always made closer and closer.

4. Underselling.—A trust should be prohibited from reducing the price of an article in a certain locality. The same price should be maintained throughout the United States. This practice is resorted to in order to drive competition out of business. The government should forbid such acts.

The Law Should Be Amended.

In order that the trusts may be properly controlled, that their powers of evil may be checked, and their good qualities may be retained, it is necessary to amend the Sherman act. The amendments proposed are: First, Federal incorporation; second, the creation of an industrial or trade commission. Certain supplementary remedies, tariff revision and the exercise of the taxing power are recommended.

Federal Incorporation.

It is becoming more apparent every day that the Federal government should have control over these great combinations which are engaged in interstate and foreign commerce. They are not confined to a section of the country; they are supplying goods for the whole United States and for foreign nations. The states are powerless, for they have no control over interstate commerce. Therefore, since the business of the nation is chiefly interstate commerce, and the states are not able to control it properly, it is necessary that the national government assume control of the big business interests of the Republic. One of the methods approved by many statesmen, that advocated by President Taft,[2] which is made a part of this program of regulation, is Federal incorporation.

Under existing laws incorporation is done by the states. When a company is incorporated in one state and desires to do business in all the states, it must first seek the permission of each state. In fact it must be reincorporated in every state in which it desires to do business. It must conform to the various state laws of incorporation. Another disadvantage of the present system is that, according to the Federal Constitution, no state can impair the obligation of contracts. Vested rights might be obtained in one state and thus give that corporation a power which cannot be taken away from it. The incorporation of corporations engaged in interstate and foreign commerce by the Federal government would remove these obstacles. It would give to the national government the necessary power to control these combinations.

A corporation created thus will better know its status. It will know its limitations. Its power will be defined in its charter. It will not have to conform to all the laws of the states in order to know that it has the privilege to do business in a certain one or in all the states. It will be given the power to carry on an interstate business. But some may say that this would be giving these trusts too much freedom, that they would be free from state restraint and hence their powers for evil would be greatly increased. Such a result is improbable,—they would be created according to their fulfilment of certain requirements. Such a law will destroy the evil of a small state like New Jersey or Delaware bidding for state incorporation by offering the trusts every possible privilege.

The Federal government could limit the powers of the corporations which it created. There would be no desire on its part to grant a corporation extensive powers as is done by some of the states. It could require a physical valuation before the charter is granted. It could prevent one corporation from holding stock in another. It could also limit the capital stock of a corporation and thus prevent too great combination.

(To Be Continued.)

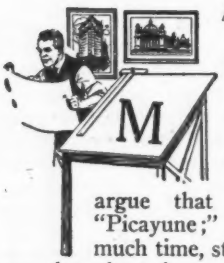
[2] Republican Campaign Text-Book 1912, p. 19.

Practical Business Systems Adapted for Use in Law Offices

COMPILED BY J. HOWARD PATTERSON, LL. B.

Of the Williamsport (Pa.) Bar

[Ed. Note.—This is the fifth of Mr. Patterson's practical and valuable series of articles on this subject.]



MANY lawyers, particularly those practising in cities, believe that it is unwise for an attorney in general practice to handle collections. They argue that the business is "Picayune;" that it takes so much time, stationery, and postage that there is no profit left; that a lawyer, particularly a young one, cannot afford to antagonize people by collecting money from them; and that if one becomes known as a collection lawyer it is apt to keep more lucrative business from coming to the office.

All accounts placed for collection are not small; not even all accounts of the type known as "mercantile collections." Even if they were this would be no argument against handling them, for the profits in many lines of business come from the volume of business handled, instead of from large gains on each particular item. It should be remembered that the largest building in the largest city in this country was built from the profits earned in five and ten cent stores.

The claim that the expenses use up all the profits may be true, but, before accepting it as a fact, the question should be carefully investigated. This statement has been made so often that most lawyers believe it without ever having looked into the matter at all. One lawyer who was in general practice took it for granted that the collections which he was forced to handle were taken care of at an actual loss to him until he made an examination of his account books. He was very much astonished at the number of bills he had collected during a period of five years, what amount of money it had actually cost him to make these collections, and what his fees had been on the ones he had collected. After this investigation he commenced to push his collection department very hard, and has made it an important part of his practice. The answer to the question as to whether or not there is profit in the collection business depends largely upon the ability of the collector. Any lawyer who can collect a fair percentage of the bills placed in his hands will make a profit from them. The larger the percentage collected the larger will be the profit. It is like any other business, however, it must be studied or else acquired through experience. Without any particular knowledge of how to collect money no one should expect to get the money on a very great number of the accounts handled. Mere admission to the bar does not make a finished collector of any man. Being a lawyer is a decided help in collecting money from a person who owns property, but is of little advantage when the debtor has nothing that can be seized for paying the bill. It is for collecting from the latter class that the largest fees can be charged. An expert collector can often get money from a bankrupt to pay an outlawed account. When he does anything of this kind he is well paid for his work. The subject of how to make collections is well worth studying for any lawyer who desires to be able to do more than get the money on uncontested claims from perfectly solvent debtors.

There is no excuse for making enemies by handling collections. Only unskilful collectors do this. When a claim is

properly handled a friend can be made of the debtor every time. Every lawyer has one or more clients who first came into his office to pay bills of other clients. Why not handle all claims in the same manner as these particular accounts were handled?

Some of the largest law firms in the country maintain an active and extensive collection department. This does not appear to injure their professional standing. They are not known as collection lawyers exclusively. Lucrative business of all kinds is placed in their hands. This would seem to prove that handling collections, if properly done, does not injure the prestige of a lawyer.

It is generally supposed that the greatest advantage gained from handling collections is in the indirect returns from this class of business. Few lawyers realize how great these indirect profits really are. If they did, more of them would specialize on this business. Many fees will come in from people who first come to the office to pay bills. People employing an attorney to handle accounts for collection will gradually come to give him other business of a more strictly legal character. Both of these two classes of people will recommend the attorney to others. What at first appeared to be merely a claim for collection will often develop into a strictly legal proposition. Many a lawyer is employed to apply for a receiver because he holds a bill for collection and first came in contact with the insolvent in this way. The indirect returns often secured from the collection business are so great that it would pay to handle this business merely as an advertising proposition or as a feeder for other business even if it was itself handled at an actual loss.

The lawyer who keeps a careful account of the fees received directly and indirectly from his collection business will find that there is an actual profit to be made from collecting bills; that it does not necessitate making enemies, but wins friends instead; that there is no loss of prestige, and that as a feeder to bring other business into the office it cannot be surpassed.

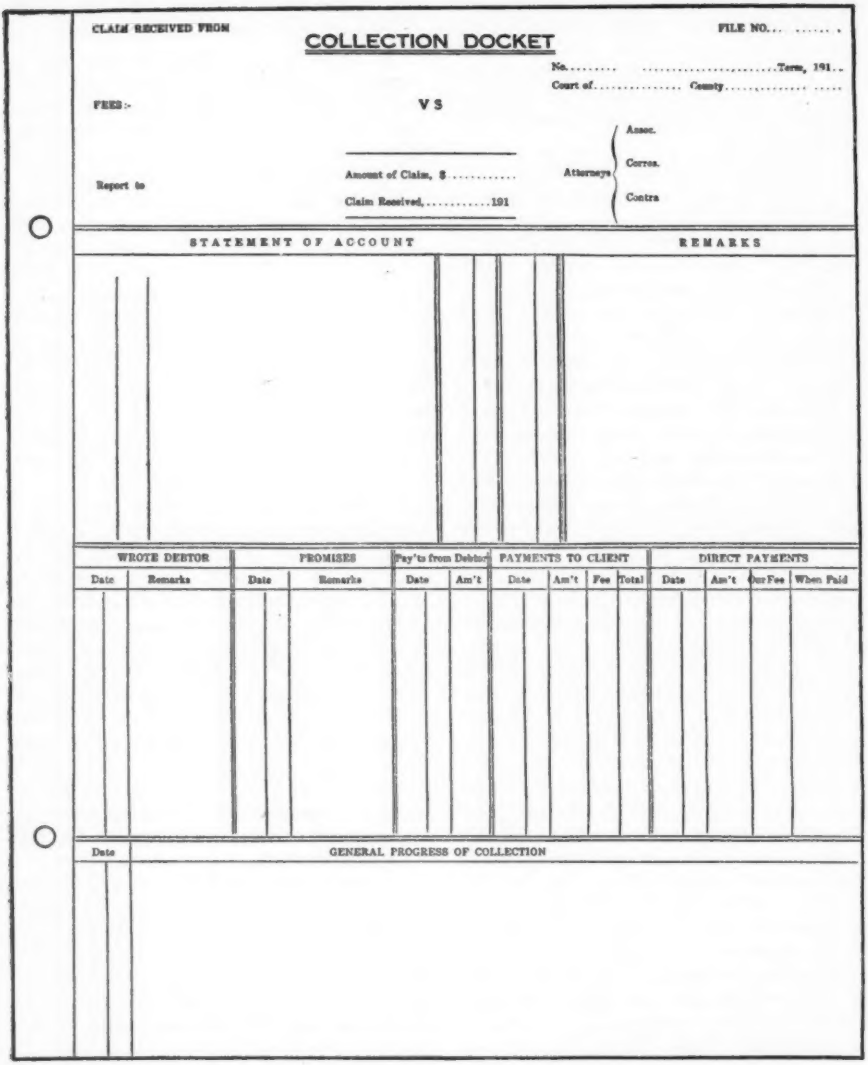
Separating the Collections from the Other Business.

In those offices where a specialty is made of collecting it will be more practical to keep business of this class separate from the regular legal business. When desired, a clerk can be placed in entire charge of the collection business, and the other work is not interfered with. Separate records and files will make these matters more easy to refer to than they will be if carried along with the regular business. This also facilitates handling the work. Separating this class of work indicates that collecting is only one branch of the work in the office, and not the main purpose of the business. It notifies the general public that the office is equipped for and desires this kind of business, and as a result more of it will be secured.

In most law offices where the collection business is separated from the other business, a "collection department" is maintained. When the business warrants it this department is usually placed in charge of a clerk or manager who has entire supervision of it, and in many cases interviews all callers coming to the office on collection business. The letter heads used have the words, "collection department," printed on them. Separate records and files are kept. This plan identifies the attorney's name as closely with the collection end of his business as though there were no separate department maintained.

In a very few offices the collections are handled as an entirely distinct business, instead of through a separate department. Some name is chosen and placed on the door under the lawyer's name. Letter heads are prepared with this name on them, and the business is handled in the office as though it were merely a separate department. When a collection is sent to an attorney who handles his business in this manner he notifies his client that all collections in his office are handled under his own supervision, but under the name he has selected, and that all future correspondence referring to the claim will be carried on under this name.

The separate-name plan has a number of decided advantages over the separate-



CLAIM RECEIVED FROM

COLLECTION DOCKET

FILE NO.. .....

No..... .....Term, 191..

Court of..... County.....

FEES:-

VS

Report to

Amount of Claim, $ .....

Claim Received,.....191

Attorneys: Assoc. / Corres. / Contra

STATEMENT OF ACCOUNT | REMARKS

WROTE DEBTOR		PROMISES		Pay'ts from Debtor		PAYMENTS TO CLIENT				DIRECT PAYMENTS			
Date	Remarks	Date	Remarks	Date	Am't	Date	Am't	Fee	Total	Date	Am't	Our Fee	When Paid

Date	GENERAL PROGRESS OF COLLECTION

department plan. It does not prominently identify the attorney's name with the collection business. It permits keeping after the debtor longer, and the handling of smaller and more strictly mercantile accounts than most attorneys would care to do in their own names. After all other resources are exhausted, the debtor can be notified that on a certain date the account will be placed in the hands of an attorney with instructions to bring suit. Future letters will then be written on the attorney's regular letter head, and collection attempted from an entirely different angle. Clients soon realize that this is not in fact a separate business, but is merely a different name for a separate department of the same office, and the indirect returns received from handling collections is not interfered with.

There are several other advantages which will develop from time to time, and in the end if the business is successful and the owner wishes to retire or sell it out he may do this when he could not with a separate collection department under his own name.

Care should be exercised in selecting the name under which collections are to be handled. "The blank collecting agency" or any similar name should be avoided. Not only because the name "collection agency" or "collecting agency" is contrary to postal regulations, and envelops with it on are apt to be held up by an inspector, but also because the methods adopted by so many so-called collection agencies have been such as to prejudice many people against employing them. "The blank mercantile agency" or "the blank commercial agency" is preferable. This avoids all trouble with the postal officials, and also indicates that the agency is a "reporting" agency, which has a very decided effect on a certain class of debtors.

Keeping a Record of the Collection Business.

In all offices where the collections are handled through a separate department or under a separate mercantile-agency plan the collection records and files should be kept entirely separate from the regular records and files. This will make them more convenient for reference and will avoid much confusion.

A docket sheet made to fit loose leaf binders is prepared on which to make a complete and detailed record of each collection handled. This can be printed with any blanks on it that is desired. The one shown has been in use for some time and has been found satisfactory. If the docket system is used in recording the regular legal matters, this form should be printed on paper of a different color so as to be distinguished quickly. Two binders should be used. Those sheets which refer to claims which have not been closed or settled are kept in numerical order in the one binder. When a claim is paid or closed up in any way it is transferred to the other binder and kept for future reference should the occasion arise. Each docket sheet is given a number when it is filled out. Future sheets are numbered consecutively. If the regular office business is filed under the numerical system an entirely different number should be selected for starting the collection sheets. It is still better to precede the numbers on the collection docket sheets with a distinguishing letter to indicate that it is a collection matter. For instance, the collection sheets might start with "C. L." or "C 501." This would show that the record bearing this number belonged in the collection files.

The same number and names of the parties is written on the tab of a manilla folder which is kept standing on edge, in its proper numerical position, in a vertical filing case or in a separate drawer of the vertical filing case in which the files of the regular legal business are kept.

The docket sheets and folders are indexed, both in the name of the plaintiff and the name of the defendant, in either a loose leaf index or on a card index. When either of these two plans of indexing are used in the legal department, it is not necessary to prepare a separate indexing system, but collection matters may be recorded on sheets or cards to go into the regular index. The distinguishing letter before the number will indicate that the records and files will be found in the place where collection records and files are to be found, and no confusion will result. The lack of such a number would indicate that the records and files were among those relating to regular legal business.

It is a good plan to copy the statement of account received from a client in a place provided for that purpose on the docket sheet. In fact the more information that can be put on a docket sheet the easier it will be to discuss the matter with a debtor who calls, or to write a letter to him at any time. A glance at the docket sheet will give complete information concerning the claim, and show its exact status or condition at all times.

J. Howard Patterson

Words of Advice and Encouragement to the Graduating Classes of 1914

BY THE

Deans of Ten Law Schools

SUGGESTIONS TO BEGINNERS

By Ezra Ripley Thayer, L.L. D.

Dean, Law School of Harvard University.

Practice is confusing at first. This is natural with a new kind of work. It is like the confusion of changing from college to the law school, and it presently clears up in the same way. One of the signs of clearing comes in recognizing the chance to repeat a mistake made before, and so avoiding it. The man who keeps on making the same mistake will not go far.

A beginner who is determined to make himself useful in an office should remember, as we were told on graduation, that his employer is not looking for a junior critic, or trying to discover the difficulties of his case. He probably knows them already and wants help in solving them. The student should try to do each thing that comes to him as well as he can do it, and a little better than it needs to be done, and never think any task unworthy of his best efforts. He should learn as early as possible to take responsibility, and should think out each question for himself before seeking help from others. His results should be put in neat form when he has finished, and in the meantime he should resist the temptation to run to his employer for help. The senior put this matter in the junior's hands because he wanted to be free to do something else. He might better have done it himself than be continually interrupted to instruct another.

A lawyer must arrange his time systematically. Without system there is a great waste of power in turning from one thing to another. There is nothing harder in practice than this, and law-school work is little preparation for it. A student can order his time in advance, and plan to finish one task before beginning another. This is just what the practitioner cannot do. He must somehow dovetail things together, keep them going all at once, and do on the moment whatever will not wait. He cannot tell one employer that he is working for another member of the firm, or one client that he is busy with another's affairs.

Patience, cheerfulness, and courage must be cultivated to the limit,—the first especially by the beginner. Chance figures much in the rate of a lawyer's early progress, little in his ultimate achievement, for in the end he will get about what he is entitled to if he tries hard enough.

Each case should be prepared with the last touch of completeness. A brilliant result in the court room was generally achieved beforehand in the office. And chance is so great and so constant a factor in litigation that the lawyer is in duty bound to reduce it to the minimum.

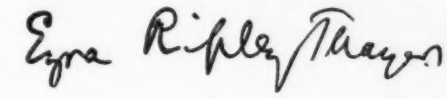
Simple honor and absolute straightforwardness are essential. Charles Sumner was right when he said, "Young man, character is everything." Such counsel should be based on something higher than the sordid maxim that honesty is the best policy; still that maxim is full of truth. The knowledge that a lawyer can be trusted is his best asset, and his professional brethren come astonishingly soon to know him for what he is.

Intellectual honesty is scarcely less important, and much rarer. The right kind of man does his best to think straight, and does not criticize anything till he understands it. He puts himself in the other man's place, and after looking at the situation with his eyes, he decides what his rights are. He may then have to persuade his client to change his view; and if the client is one worth having, the lawyer will not suffer for this in the long run. In litigation it is essential to understand the adversary's case thoroughly in advance, and not underrate its strength. The man who derides his opponent before the trial begins will probably be found abusing the judge when it is over.

A lawyer should never forget that he has other obligations than those he owes to his profession. And at the beginning, unless he is employed in a busy office, he will have no excuse for neglecting the duties of good citizenship. The opportunities for usefulness today are many and varied. No matter how

slowly business comes, it will be his own fault if he does not find some work worth doing which will occupy every minute of his time.

"This above all, to thine own self be true
And it must follow, as the night the day,
Thou canst not then be false to any man."



THE MAN BEHIND THE EDUCATION

By William R. Vance, Ph. D.

Dean of Law School, University of Minnesota.

The game of picking the winners among a class of graduates from a law school becomes fascinating to the law teacher as the years of his experience increase and afford him constantly increasing *data* by which to correct his methods of selection. A student with a keen mind that quickly apprehends fine distinctions and suggests new problems is such a great delight to the teacher of law that he is very apt, in the beginning of his career, to overestimate the relative importance of intellectual acumen in determining the success of the law graduate when he goes to the bar. Therefore he is disposed to select as the winners in any class the keen-minded students who have contributed to his intellectual satisfaction in the class room and attained to high grades on examination. But after the graduates of any given class have been six or eight years at the bar, he begins to perceive that quite frequently the keen-minded class leaders make little progress at the bar, while some other members of the class who may have sat silent in the midst of hot discussions and made only indifferent records on examination, are beginning to take high standing. Observation of these facts brings sharply to his attention the truth that a keen mind and a more or less accurate knowledge of the law by no means assure success at the bar. While these are very important factors in determining the success of the young lawyer, there are many other factors, and some of them even more important.

In endeavoring to pick the winners in any given class, I have, after many years of observation, come to apply this concrete test: Assuming that I had to employ counsel in an important case and were compelled to select one or more of these young lawyers, to which ones would I be willing to intrust my interests? The reply that I make instinctively to this question is, "To none of them." But objecting to that answer as insufficient, I compel myself to select counsel from the class. In doing so, I very frequently exclude some of the best intellects in the class, because when in my mind's eye I bring them before the bar as my advocates, I recognize that they possess certain peculiarities of temperament, or defects in personality or bearing, that will tend to impair their efficiency in the conduct of my cause. Here is one keen-witted lad, well educated and soundly trained, gentle and lovable perhaps, and yet lacking that aggressiveness of temperament that would induce him to contend vehemently for my rights against the forceful opposition of opposing counsel. Here, perhaps, is another, intellectually well qualified, but who is so contentious and tactless as to excite antagonism in all with whom he comes in contact, whether they be opposing counsel, judge, or jury. Here may be another who is lazy and slovenly in his work, disposed always to postpone tasks of every sort; or perhaps he is rash and impetuous, lacking that sound judgment and poise so essential to the lawyer, who should never lose either his wits or his temper. Thus it is that in selecting my imaginary counsel, I may frequently pass over the first half dozen men in class rating, and select as champion of my cause a seemingly inferior student.

This method of selecting the winners in any class has proved to be strikingly successful. The young man of good character and fair abilities, who is industrious and persistent, possessed of initiative, aggressive and yet not quarrelsome, tactful and courteous and possessed of good judgment, seldom fails to win marked success at the bar, while his more brilliant and erratic classmate may prove to be an embittered failure. In short, to adopt a popular expression, it is the man behind the legal education that becomes the lawyer. That the legal education should be sound and thorough is of great importance; but after all, the character of the man is far more important than the character of his legal education.

As the commencement season approaches, such floods of advice are poured upon the young graduate in law that it is not at all surprising that most of it is wasted. Certain it is that the young man entering the profession of the law learns just about as little from advice as young men entering upon any other enterprise. It seems that human nature requires that every man shall learn by his own unfortunate experiences; but it does seem to the older practitioner that the law-school graduate has more things to learn by this trying and expensive method than is necessary or reasonable. Certainly we that are endeavoring to train young men for practice ought to make every effort to see that they leave our class rooms for the offices of practising lawyers, or for their youthful appearances in court, with a full realization of these outstanding facts:

First, that they know very little about substantive law and practically nothing about procedure and the art of practice, and that it is for them to keep eyes and ears open in

order to supply as rapidly as possible this deficiency so painful to their employers and so dangerous to their clients.

Secondly, that when they go into law offices they are to do what they are told to do, and to do it promptly and well, even though it be in the nature of an errand, an unpleasant search for musty records, or the pursuit of evidence in unsavory places. They cannot reasonably expect to be put in charge of the affairs of big business on the morning of their arrival.

And thirdly, that, barring occasional accidents, pulls, and other happy chances, their usefulness to their employers and their success in the profession depends more upon fidelity, industry, integrity, and good sense than upon diplomas and class records.

W. R. Vance

PROFESSIONAL OPPORTUNITIES

By H. S. Richards, LL. D.

Dean of Law School, University of Wisconsin.

The young men coming to the bar in 1914 have no reason to feel that the opportunities in the profession are less than they were a generation ago. The profession is overcrowded, as are all professions, but there are splendid careers awaiting all who have the training and the courage to take advantage of their opportunities. The continued economic and social unrest of the past decade has resulted in great activity in legislation in an effort to meet real and fancied social and business evils. The governments, both state and national, are taking a large control over business enterprises of all sorts. Public-service companies are being subjected to minute and comprehensive regulation. New governmental agencies unknown a generation ago have been created to make effective the new attitude of regulation and control over business. These agencies in the form of boards and commissions exercise judicial and administrative powers of vast extent,—still largely undefined and undeveloped,—presenting new and difficult legal problems. The young men now coming to the bar will have to solve these problems —either as members or advisers of these boards; or as the representatives of those who must conduct business under the new dispensation, or as attorneys or judges in the courts, which are the final arbiters of constitutional powers. Thus in a decade an entirely new field of usefulness for the lawyer has been created, and its boundaries are not yet fixed. Has the traditional field of the lawyer been affected by the legislation which expresses social and economic changes? Undoubtedly it has. Personal-injury suits, which now occupy so much of the time of the courts, are in a fair way to be eliminated, as far as the actions are between employer and employee, in those states where workingmen's compensation acts are in force. It is a matter of congratulation to the profession that this is so, as it tends to eliminate an undesirable type of lawyer.

Litigation as a whole has probably not kept pace with the growth of the nation in population and wealth. This does not mean a falling off in legal business, since modern business conducted on a large scale by great corporations has learned that compromise is more profitable than litigation, and that a lawyer's services before a transaction is started are more valuable than after the client has involved himself in legal difficulties. The result is the growing importance of the counsellor side of the practice. The great commercial development of Great Britain has made the solicitor class more prosperous than their brothers, the barristers.

The conclusion is that the opportunities within the profession are broader than a generation ago, but the character of the business is rapidly changing. It is patent also that a new sort of training is demanded; oratorical ability no longer counts for much; and a broad knowledge of business, economics, and history count for much more. Young men of ability who come to the bar with a broad foundation of general culture as a basis for their legal training have no cause to view the future with dread.

H. S. Richards.

THE CODE OF FINALITIES

By Charles F. Carusi

Dean, National University Law School.

In your practice you will come into contact with various codes of law and procedure. But outside of these there is a code whose importance to every lawyer, indeed to every individual, is paramount. It concerns itself but little with legal principles, whether of practice or of substantive rule; nor, while it controls conduct, is it to be identified with any code of general professional ethics. It has to do with something more subtle, more refined, less general and more personal, than any of these. It is the code of finalities ac-

cording to which each of us, consciously or unconsciously, shapes his acts and governs his course. Its fundamental conceptions make up the major premise in life's syllogism. Back to it are related all those ideas, impulses, and tendencies which go to make up what is called one's "attitude toward life" and toward the profession. To general ethical conceptions you may give thought and an abstract assent, but it will be to your individual code you will resort for the rule of daily action. No man is without such a code, although to some, its characters may be blurred and indistinct. To the superior man its provisions are so clear cut and stand out in such relief that not even passion, prejudice, or self-interest will obscure them. Keenness of mental, like that of optical, vision lies not so much in enlargement of field, as in the clear outlines of objects within it. Your code is not one of many sections. Composed of fundamentals, its commandments, like those of the Hebraic tradition, are brief and few. And even they, you may remember, were resolvable into two, and of these two there was one which contained all the others, and which, in establishing the golden rule, epitomized the religion of Christ.

It is not the thought that I, or any man, should dogmatize to you as to your code. Into the one you will adopt, and you are sovereign in such legislation, you will find expression, temperament, secular and religious training, individual experience, and aspiration. Accordingly you will strive for those particular rewards of the profession which most nearly coincide with your preconception of what is best worth while. Remember this, however, and this is the only word of advice ventured upon, do not drift; adapt your conduct, even in the little things, to some well-defined and deliberately chosen end. For whatever port you destine your cruise, steer steadily for it, eye on compass and heedless alike of current and tempest. Whichever of the rewards of the profession you pick out as the one essential, shape your course unswervingly to that end. Is the winning of causes and the collection of fees the paramount ambition, you will be most likely to gratify it if all else is subordinated. But if you escape shipwreck and achieve your end, cast no belated glance of envy at the other fellow who glories in an unsullied self-esteem, and is happy in the good will and confidence and respect of the courts, the members of the bar, and of the community. In the beginning he was no better than you, he adopted a better code. He made the achievement of a high standing at the bar the paramount principle of action, and, having adopted that as a finality, treated every suggestion, impulse, or desire that conflicted with it as a nonessential, an irrelevancy, an impertinence.

Charles F. Carroll,

AVOID THE OFFICES OF MERE MONEY MAKERS

By Robert L. Henry, Jr., Ph. B., J. D., B. C. L.

Dean, College of Law, University of North Dakota.

The word I should like to offer to the graduating classes in our law schools is to keep out of the law offices in which the practice of law is looked upon solely as a business, that is, as a means of making money. I say that not only that you may save your ideals, but that your opportunity for success in a material way may not be placed in jeopardy.

I have kept in touch with many of my fellow students of law-school days and with many men of successive classes which have gone out from the institutions with which I have been connected as a teacher of law. The one thing that has impressed me most in contemplating their career is the tragedy of the lives of those who have fallen among thorns or on barren ground.

If you plan to begin practice by going into a law office you should be as careful in selecting the right office as in choosing your mate before entering upon matrimony. Your future welfare and happiness is to a large extent dependent upon your choice, and your decision is apt to prove irrevocable.

If the object of the members of a firm is solely to make money, they will indulge in unethical practices themselves and will expect their subordinates also to do so. A young man who works in such an atmosphere must imbibe it. He has fallen among thorns which will choke out his ideals.

Also a firm with such an attitude will try to get as much work out of you as possible and will pay you as little as possible. Many large offices are run in such a way that the law work is done by clerks, and nearly all the earnings go into the pockets of the successful organizers and business getters who head the firm. Don't expect to get into such a firm and to receive a fair share of the financial returns unless you have a pull, or unless you are of such brilliant parts that the firm can't get along without you and in addition have sufficient nerve to force them to give you the place you deserve.

Again, it pays better to have each clerk, each cog in the machine, confine himself to one kind of work. Men not only have had their hopes of financial success blasted in the kind of office which I am contemplating, but have come to realize after a few years that on account of having been confined to one groove, they are little better prepared to begin for themselves than on the day they left law school. Men in such a situation learn that they have fallen on barren ground.

But how is a man to tell whether a reputedly successful member of the bar looks upon law as a profession or not? There is no in-

fallible test, but a careful inquiry will reveal the facts. In general it is well to avoid the large offices, those in which there are many clerks. Also it may be worth while to take into consideration whether members of the firm have annual retainers from large corporations whose interests are apt to conflict with those of the people. The nature of the business handled in an office may be an indication of the atmosphere. Don't be deceived into thinking that the benefit you will derive from being in an office has any direct relationship to the incomes of the heads of the firm. If their earnings are due to their being truly great lawyers, and not merely successful business men, and if they take a deep interest in the welfare of the young men in their offices, then the gain is great. But if they are merely organizers and business getters, without a high conception of the profession of law, and especially if the number of the men in the office is large and the heads of the firm little interested in them personally, then beware.

Robert L. Henry Jr.

PROFESSIONAL IDEALS FIRST

By Clarence D. Ashley, LL. D.

Dean, School of Law, New York University.

It is of first importance for the young men of the graduating classes of the law schools to remember that in joining the legal profession they assume a serious obligation.

A lawyer who desires to be true to himself and his profession has a high ideal to meet. He must observe scrupulously his duty to the public, the courts, and his clients. In the bitter struggle for existence, which meets most young lawyers, the temptations to be overcome are various and often insidious, but they must be conquered, if he is to obtain true success. Often he may err unintentionally, and fail to appreciate that certain actions are ill advised, although perhaps not strictly unethical. He cannot be too careful in scrutinizing his own course. He should not be misled by the thoughtless jibes of the public, but bear in mind that the profession is very much alive to ethical standards, and, also, firmly opposes commercializing the practice of law.

Let professional ideals come first, and money making be always strictly subordinated to professional duty.

As he gains experience, he will find that these views are strictly those of the profession at large. No young man can obtain true success at the bar unless he has the respect of its reputable members.

Clarence D. Ashley

PROBLEMS OF THE PROSPECTIVE PRACTITIONER

By Marshall McKusick

Dean of College of Law, University of South Dakota.

In the early part of June the law schools of this country will graduate from their ranks a large body of young men who will enter upon the legal profession as their life's work. Many questions will arise in the minds of these men as to their fitness for the task spread before them. Have I mastered the rules of practice and procedure necessary to prepare a case for trial? Have I prepared myself sufficiently in legal theory to understand and appreciate the principles upon which a case in the concrete rests? Shall I start out alone or seek an apprenticeship or partnership with an experienced practitioner? Have I the physical health to stand up under the strain and confinement necessary to win a reputation at the bar? Am I sufficiently endowed with the patience and perseverance necessary to fortify myself against adversity? Am I in love with my work and willing to sacrifice and engage in unceasing toil in building up a practice? Am I temperamentally fitted for professional life? Am I a student of human nature and interested in the social and economic conditions which are pressing for solution? These are a few of the more important problems that ought to receive attention by every prospective practitioner.

The law schools generally are beginning to appreciate the vital importance of a systematic course in practice and procedure. The task is minimized in those schools where a large per cent of its graduates expect to practice in the state where the school is located. Special emphasis may be placed upon the local practice and procedure, and a confidence may thus be given the student that he is properly grounded in the trial practice of that state. It is of great advantage to the student to select the state where he expects to practise early in his law course, and if there be a reputable law school in that state matriculate there. He will find, usually, that those schools devote much attention to the law of that state in particular, and specialize upon the local practice; thus, in a large degree, solving for him the problems which he would otherwise be obliged to master if he studied law in another state. It is the business of any law school to teach its students to think clearly and accurately in terms of settled legal principles, to analyze, test, and weigh precedents under the light of reason so that they may be able to apply old principles to new statements of fact. How is this end to be accomplished? By "case system" methods? Not entirely. No system of legal pedagogy can be premised solely upon the case system with entire success. It tends to warp the individuality of the teacher to a great extent,

and, unless supplemented with collateral reading, results in an illiberal and chaotic perspective of jurisprudence. There are too many case lawyers already, and a return to fundamental principles must eventually follow.

The law-school course of three years is hardly sufficient to prepare a young man for immediate success in practice. It should be supplemented with practical experience in a law office for a year at least. In that way the actual business ideas in handling legal problems become fixed in mind definitely. To this end an apprenticeship or partnership with an older attorney is desirable. But such an association is frequently not obtainable, or even if obtainable, the experienced practitioner may not be an attorney who will give the young man helpful and ethical instruction, but rather the reverse. Such an attorney, lax in business methods, with no system in administering the details of his office and with a perverted sense of the ethics of his profession, would be a decided hindrance to a young man's success. Better by far is it to start in alone than under such circumstances.

The exacting sedentary work of the active practitioner requires a robust physique. Physical unsoundness is not assisted by such strenuous toil, and even the most vigorous bodies will break under the strain unless proper and systematic exercise is indulged in. An hour a day spent in a brisk walk, or in tennis, golf, or other form of outdoor exercise, pays large returns upon the investment.

The secret of success for all who would live in what Coke calls "the gladsome light of jurisprudence," is drudgery, never-ending work, self-discipline, and thorough preparation. There is genius in art, poetry, music, and literature, but genius in the law is no more than a capacity for untiring work, life-long perseverance, patience, and ceaseless industry. Greatness is measured by efficiency, and every man is great who does his work fearlessly and well. Few men have ever won success in law by genius or by luck. The consideration of the world's contract is preparation. More than ever in this age of severe competition, when, as Carlyle says, "the race of life has become intense; the runners are treading upon each other's heels; woe be to him who stops to tie his shoestrings."

If there be any one study which stands out pre-eminently as a prerequisite to the success of the advocate, it is the constant study of men, human nature, man in his endless variety. Not man as he is pictured in the books, but the man of action, of blood, that kaleidoscopic creature of whom God has never yet made two alike. One will never know men, except by living with them, being of them, sharing their joys, dividing their grief, in short, by living life. Its very shadows make life beautiful.

If one's command of language seems imperfect, it is well to remember that early fluency is a dangerous gift, often a temptation to laziness. Words will come if you are fortified in the preparation of your case. Ex-Governor Folk, of Missouri, a brilliant lawyer, was once asked what his secret of success as a trial lawyer was. He replied, "I always endeavor to study my own side of a lawsuit from every angle, but I find it pays to know my opponent's case better, if possible, than I do my own." One's information must be without limit. Young men who aspire to the battles of the court room must go through life with ears and eyes wide open. They must delve into business life, political science, history, general literature, all the arts and sciences, mechanics, bookkeeping, banking, accounting, sociology, human industry in every form. Sir Walter Scott himself trained for the bar, forcibly said, "A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these he may venture to call himself an architect."

Marshall McKusick

LOCATION AND INTERVAL BEFORE LUCRATIVE PRACTICE

By Enoch G. Hogate

Dean, School of Law, Indiana University.

As the time approaches for the law student to graduate, the question comes more and more forcefully to him, Where shall I locate? It is a question that but few are able to determine in advance and be well satisfied with the decision made. When looking over the field, the new lawyer may settle on a location and time will reveal it is a misfit, but if so, it is because of the man himself rather than the place. No doubt everyone ought to locate where there is business, and where the outlook is for an increase of business. If, then, the person has a legal education, and the right kind of stuff in him, he will, in due time, get his portion of the legal work.

But the law graduate is prone to say a particular field is already full of good lawyers who have the best of the business, and can command all of it. As Webster said, "There is always room at the top;" and if a novitiate in the practice has the dogged determination to hold on and fight, he will find, even in that field he now thinks full, there is a place for him. It goes without saying that if a location that superficially looks good is not already filled with lawyers, it is because there is not enough business to justify lawyers settling there. If the student—the one who is just ready to launch into the active practice—will settle where there is business, and shows capabilities on social, economic, political, and legal lines, he will realize sooner or later that that portion of the world has been waiting for him, and he will succeed.

Again, let the new man in the practice remember that there is always a period of waiting before he may hope to see the sun arise on his field of an inviting and lucrative law practice; but, really, that period of waiting is most desirable. He has the opportunity to study conditions, his environment, to adjust himself to the situation, to form friendships, in social, business, and political life. Better than all that, it furnishes the opportunity to live among his books and know where to put his fingers on the tools of his trade when he has occasion to use them. He ought not repine if he does not get big cases to start with, nor be envious of those who do secure the big cases. I can think of nothing more disastrous to the young practitioner than to get a case early in his practice that is too big for him to handle, and make a failure with it in court. He has a failure charged up to him, with no line of successful cases back of him to compensate. He has butted his head against a stone wall and has been disfigured. Better have a number of small cases at first with few points in them. And it is not meant by this that he should seek small cases, nor, on the other hand, that he should seek large cases, bristling with legal propositions and technicalities, but if he succeeds in handling the small cases, with ever-increasing importance, he will get the larger ones when he is able to handle them. Business men with large ventures are seeking lawyers who can handle their business, and will seek the practitioner as soon as he has demonstrated his capability.

So, I say to the graduate in law of this year and the succeeding years, "It is up to you." The legal and business world will receive you kindly if you will let them; business will come to you if you are equipped for it and desire it. There is no reason for discouragement, for there is abundant room for the practitioner who practises law as a science, and is determined to uphold the high ideals of the profession, and not to prostitute the high calling.

Enoch G. Hogate

FROM LAW SCHOOL TO FORUM

By William Hoynes, LL. D.

Dean, Law Department, University of Notre Dame.

It affords me pleasure to contribute some suggestions to your happily conceived symposium for the encouragement and guidance of the young men who are soon to receive their diplomas from the many law schools in which they are studying throughout the country.

The laurels and honors of academic triumph merge appropriately with the ceremonies of graduation day—a day of peculiar significance in marking the transition from the closing exercises of college life to the commencement of individual experience and responsibility in the busy and engrossing workaday world.

How sudden and radical the change! In the course of a single day the world of youth and poesy fades away into that of grim reality, with stern and prosaic aspect. But with the change comes a new sense of self-reliance, the inspiring influence of which impels the newcomer eagerly forward to participate in the affairs of the newly disclosed domain of duty and toil, care and anxiety, opportunity and hopefulness.

From whatever point of view we regard the situation we shall find that he has a trying task before him in the matter of finding or making place for himself. Hence the propriety of welcoming him with cheering words of encouragement and advice, at the same time suggesting the means of compliance with his professional obligations, achieving a fair measure of success, and doing credit to himself as a representative lawyer.

In this spirit I venture to say that law graduates ought to be mindful that a sound education is essential to creditable standing and efficient work in the profession. It is their duty so to study the law as to recognize it as a profound science rather than a mere art, and to endeavor to make the profession as learned in fact as it is in name. It should be remembered that all branches of human knowledge, all things in the domain of nature, all the erudition of the ages, all systems of philosophy and religion, all things actually or potentially in being, are tributary to the law and within the scope of its supervision and protection. Is it not clearly evident from this point of view that there is no profession which demands of its votaries a more liberal education than the law?

It is a life study. The graduate who triumphantly passes the examination for a license to practise at the bar is simply a beginner. If the foundation of his legal knowledge be deep and solid he may securely build upon it a superstructure creditable to himself and honorable to the profession. The best service a law school can render is to train him how to build in that way. To build otherwise, or to work at the superstructure before laying the foundation, is to fail at attaining to high rank in the profession.

It may be stated unhesitatingly that no profession requires closer application and deeper study than the law. Students are prone at times to think that they are obliged to work inordinately hard in preparing for recit ons and examinations, writing duties and ses, doing moot-court work, and the like. ut if they were to observe how assiduously and even strenuously the judges of even the highest courts feel constrained to work in the prep-

aration of opinions, taking into account collaterally and studying virtually all the decided cases on the subject under consideration, they would be compelled in candor and modesty to admit that their own tasks are comparatively light.

And it may be pertinent here to remark that not only law students, but law graduates, and even lawyers in active practice, would do well to cultivate the virtue of modesty. This attribute, shading off into genuine humility, went far to make Lincoln the successful lawyer and popular hero that he was—the greatest and noblest character on our roll of fame that he is. It would be a deplorable mistake on the part of law students to boast of their attainments. One really learned in the law readily recognizes the shallowness of the mind that does so. Law graduates should instinctively say less of their work than it says for them. Self-exploitation is vulgar and offensive. Moreover, it is likely to be viewed as a challenge to the examiners, and this would be exasperating enough to make them stricter and more searching in the examination. Conceit is a conspicuous target for the shafts of those who take pleasure in exposing shams. It bespeaks a mental obliquity almost pitiable in the estimation of well-balanced people. The more a person praises himself the more inclined others are to accord him a monopoly or quasi copyright in that line.

But a weakness of this kind is seldom attributable to lawyers in active practice, and it is more pertinent to ask what should be done to afford reasonable assurance of success. In answering the question one might truthfully say, "Read repeatedly and carefully follow the Code of Legal Ethics." This will at least assure a person of the respect and confidence, not only of the bench and bar, but also of the community at large. In its comprehensive scope the law covers all our acts and all our thoughts. A person indoctrinated in its principles knows what they sanction and command and realizes their guidance in everything he says and does. Its influence directs and its admonitions sink deep into the nature of its disciples. Its principles necessarily enter into the warp and woof of a character true to them. No monitor could be more frank, vigilant, and attentive. By this task a true lawyer may be depended upon implicitly as an upright, honest, honorable, truthful, and chivalric man. He must necessarily be so if he be imbued with the principles and deep in the knowledge and learning of his profession.

He is not a lawyer, but a mere quibbler and trickster who is unreliable, untrustworthy, untruthful, dishonest, and mercenary. Courts withhold from him their confidence, juries distrust him, and he is shunned by the reputable element of the public. He becomes the sentinel, as it were, of all species of crime and iniquity, retained to warn and protect them.

The appearance of a law office has not a little to do with creating an impression and serving as a factor in the development of business. Needless probably to state, it should be kept neat and tidy. Books and papers should not be exposed carelessly on desks or tables, but placed where they belong in the receptacles prepared for them. This arrangement aids the memory and serves as an assurance of promptitude and accuracy in the customary work of the office. When a promise is given it should be strictly and punctually kept. No haphazard statement should ever be made in respect to a pending trial or the execution of important documents. Inaccurate statements, or even indifferences as to their truth, tends invariably to undermine confidence in the reliability, knowledge, and business efficiency of the office. Whenever money is collected for a client it should promptly be deposited in bank as his money, or paid over to him as speedily as practicable. The fees should be reasonable and gauged with reference to the amount involved in the litigation. And the reputation of the office ought not to be overlooked in the matter. Custom fixes upon a comparatively moderate standard before the reputation of the office is made. On this point the late Attorney General Brewster was wont to say:

"A lawyer starts life by giving $500 worth of law for $5, and ends by giving $5 worth for $500."

This is, of course, highly exaggerated, but whatever standard may be fixed upon special caution should be observed to avoid the imputation of being avaricious or a greedy lover of money.

The circle of a lawyer's clientage steadily widens with his reputation for ability and integrity, punctuality and trustworthiness, fidelity and professional honor. Though court work may seem irksome and be distasteful, as many acknowledge, speaking from experience, yet there is no good reason for lamenting the fact, as a fair office practice is often the more lucrative. From a financial point of view, however, the distinction does not appear to be notably important. A reputation for integrity and efficiency is the chief thing to be sought. This commands an assured income. Referring to this phase of the subject, the late Justice Samuel F. Miller, of the Supreme Court, says:

"The true lawyer is seised of an estate as secure, and venerable as an estate in lands; its income, better than rents; its dignity, higher than ancestral acres."

While it is admittedly important and helpful to be ready and accurate of speech, especially in court work, yet this is altogether secondary to a deep and precise knowledge of the law and the power of cogent reasoning—or, as stated by Sir Charles Russell, "A ready memory, good health, and the power to array facts in the order of time," he considered the three prerequisites to success at the bar. And what is called eloquence usually becomes ridiculous, save in criminal trials, where a prisoner acquitted goes free, the state having no power to put him again in jeopardy. In fact, a man's reputation as a profound lawyer may under certain circumstances be compromised by this sometimes dangerous gift. For ex-

ample, in referring to the brilliant Seargent S. Prentiss, of Mississippi, Chief Justice Marshall once said:

"If it were not for his surpassing eloquence he would gain the title of the best legal mind in the country."

Proceeding somewhat further, but in the same line, and closely relevant to the subject, it may be permissible to quote here what Benjamin F. Butler, himself a noted lawyer, says in regard to the work to be done and the qualifications requisite to achieve success at the bar:

"I do not believe in genius carrying a man along in the practice of the law, and I want here to record for the benefit of the young men who come after me in the profession that diligence, hard study, and careful thought are the only roads to success in any branch of the law."

This vigorous statement sums up the situation accurately, and offers a key that serves unfailingly to unlock the door of opportunity leading to professional success.

William Hoynes.

WORDS OF ADVICE FOR LAW ALUMNI

By Hon. Henry H. Ingersoll

Dean, College of Law, University of Tennessee.

What to do, and how to do it! That's the problem personal to every law graduate in America, just ready to enter the field of practice. The days of dreaming are over; the days of devotion to topical study are past. Henceforth your footsteps will not take you along beaten paths, and under the direction of tutorial guides. You will go into the open field and be the creature of circumstance.

Chiefly you will do what you must, not what you choose. You may elect what field you will enter,—criminal practice or civil practice, chancery cases or jury trial, patent law or corporation law. Such choice may be open to you if you locate in a large city; and so, also, your connections are doubtless prearranged, and your advisors selected. You are not expecting advice from CASE AND COMMENT, or Bench and Bar. These columns are not for you; but rather for that other *alumnus* whose course is not predetermined.

The neophyte who has decided to be a lawyer, who has taken his law-school course and gotten his sheepskin, who has spent all his cash—and more too, (thanks to his friends), who must make his living by general practice, and has resolved to try—what is he to do—and how?

First, choose your *locus vivendi* and gain admission to the state bar. Possibly your diploma will prove an open sesame. Some states permit this; most do not. We'll assume that your chosen state requires all applicants to pass a bar examination,—not the old sort beginning—"Do you know the way to the nearest bar?"—but a genuine, practical test of legal knowledge to qualify a postulant to represent parties in their court contentions. What will you do?

Prepare for the examination. I will not assume that you are a class-prize man, nor one who has gotten your sheepskin "by hook or by crook." You are one of the great mass of graduates who can pass or fail to pass according to conditions. I have known graduates with good grades, men of the upper third, to fail to pass an average bar exam., not once only, but even a second trial in the year. And so I say—prepare for bar exam!

That's what to do. How will you do it? Not by frolicking away the time from commencement to bar-exam. day, as has been done. Don't assume (presume?) that you know it all, and can write it all out correctly when called upon.

This you might do—many have accomplished it without particular preparation,—not all who tried, however. In the days or weeks elapsing between graduation and examination make preparation for it: (1) By "getting the hang of the game;" (2) by preparing to play it with reasonable confidence. How shall you do this?

1. Learn how the bar examination is conducted. Usually they are held by written questions. Obtain, if you can honorably, copies of past examinations. One will suffice, two are superabundant. Don't suppose the same questions will be put to you. That's not the use of the old exam-paper. Its value to you will be to show the general form, style, and content of the question. You may possibly "get on to the pitcher's curves, and drops and shoots," against the day you must come to the plate.

2. Review your course, not entirely, but specially the topics of the earlier part which may have been forgotten. You may thus revive memory and reason. You may do this profitably alone—better in company with a chosen few, who are in your own plight and condition. Discuss together the separate topics—never more than one a day. Organize your class. Appoint a leader for each topic. Make an orderly review and thus get the good of your study and exercise. You'll never have cause to regret it.

By pursuing this method of preparation for examination, many an ordinary ("ornary"?) scholar has been enabled to honorably pass a creditable examination and gain admission to the bar, when his careless, over-confident betters have failed to come through.

I had intended to advise on choice of field and connection, but I've "overcrapped myself," and leave that ground for others.

Henry H. Ingersoll.

Editorial Comment

When we mean to build,
We first survey the plot, then draw the model;
And when we see the figure of the house,
Then must we rate the cost of the erection.
—*Shakespeare.*

Case and Comment
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Power to Establish Building Line

In considering an attempt by a statute or ordinance to establish a building line on a street, by which property owners thereon would be prohibited from building nearer to the street than the line, it is said in 1 Lewis on Eminent Domain, 3d ed. § 227: "Such a law deprives the owner of the lawful use of his property, and amounts to a taking thereof within the meaning of the Constitution, and, consequently, can only be carried out by making provision for the compensation of the owner." A similar view is set out in 2 Dillon, on Municipal Corporations, § 695, which says: "Thus the legislature cannot, for the purpose of promoting the beauty of park ways or boulevards, authorize a city to establish by ordinance a building line within the limits of private property, to which all buildings must conform, without complying with the constitutional requirements as to making compensation for property taken."

Both of the authors cite the case of St. Louis v. Hill, 116 Mo. 527, 21 L.R.A. 226, 22 S. W. 861, in which a statute authorizing in certain cities a building line, between which and the street line the owner of the property might not build, and an ordinance attempting to make provision for such a building line, were held unconstitutional, because no provision was made for compensation to the owner of the property; and, further, because there was no provision for condemnation proceedings or for notice to the owners of the property. In arriving at a conclusion the court said: "The day before the ordinance went into operation, defendant had the unquestionable right to build at will on his lot; the day afterwards, he was as effectually prevented from building on the 40-feet strip, except under peril of punishment, as if the city had built a wall around it, and this, too, without any form of notice, any species of judicial inquiry, or any tender of compensation. If this is not a 'taking' by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city."

So, a statute which provided that on certain streets the owners of the abutting property might not erect any building, with certain exceptions as to porches, statuary, etc., nearer to the street line than a certain number of feet, but which

made no provision for compensation to the owners, was held unconstitutional in People ex rel. Dilzer v. Calder, 89 App. Div. 503, 85 N. Y. Supp. 1015, wherein a writ of mandamus was granted to compel the issuance of certain building permits.

This question came before the United States Supreme Court in Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 33 Sup. Ct. Rep. 76, 42 L.R.A.(N.S.) 1123, where a municipal ordinance requiring the committee on streets, upon the request of two thirds of the owners of the abutting property, to establish a building line on the side of the square on which such property abuts, not less than 5 nor more more than 30 feet from the street line, was held an unconstitutional infringement of the guaranties of the United States Constitution, 14th Amendment, which cannot be upheld as an exercise of the police power.

The somewhat recent Colorado case of Willison v. Cooke, 54 Colo. 320, 130 Pac. 828, 44 L.R.A.(N.S.) 1030, decided that a municipal corporation has no authority inherently, or under the general-welfare clause of its charter, to require buildings to be erected with respect to lines established some distance from the street, and an ordinance so providing is held to deprive the lot owner of his constitutional property rights.

Hungary's Model City

"Outside Budapest, Hungary, about twenty-five minutes' ride from the capital," states the Los Angeles Times, "the government has nearly finished building a model suburb for its employees and some of the city's working people, a village which bids fair to rival any similar projects which have been attempted by private or public effort.

"On a rolling plain where before was nothing but an occasional tilled field has been erected enough two and four family model houses to hold 10,000 families. For three years—or since 1909—the government has labored over this site until it has transformed it into a neatly arranged town, tree lined, and already breathing fragrantly of flowers.

"The scheme, which originated in 1908 in the brain of Dr. A. Weckerle, then president of the Council of Hungary, was a broad one. Not only should the houses themselves be perfect, he decided, but the surroundings should be as great a contrast to the crowded tenement sections of the capital as possible. And so it is that the houses are set far apart, and that with each house is a garden.

"The houses in the Weckerle-telep, as it is called after its founder, will be rented at from 160 to 330 crowns or $32 to $65 a year. The rents are proportioned to the expense of building and maintaining the settlement.

"This model town is in line with the work Hungary has been doing for years to benefit the working people within its borders. The first relief on a large scale was attempted at Budapest, because the greatest congestion is there. The capital has grown at a speed only second in Europe to the growth of Berlin. The population now is nearly a million."

Workmen's Compensation

The Federation's Workmen's Compensation Commission of six members, composed of employers, public men, and representatives of the American Federation of Labor, has completed the report of its investigation of the operation of state laws, to which the past six months have been devoted. It not only analyzes the various state workmen's compensation acts but makes comparisons between elective and compulsory laws, the merits and demerits of the provisions upon methods of insurance, amounts paid to the injured or their dependents, cost of compensation, medical and hospital aid, employments covered, injuries covered and methods of administration, discusses exclusiveness of remedy and litigation, makes suggestions for amendments to the laws, and shows the need for uniformity of legislation.

The Commission found that not only are more than 5,000,000 workmen now operating under compensation laws, but that laws going into effect during the coming year will bring several million more workmen under this system. Even elective acts have been so generally accepted by employers and employees in states where they are in force that in those instances a vast majority of industrial accidents are covered.

In the absence of compensation laws, undoubtedly there would have been a further expansion of the employers' liability, with their defenses removed and the adoption of strict safety requirements. This is indicated by the recent decision of the United States Supreme Court in reference to the Federal safety appliance act, under which the railroad company is even held liable to an injured employee for failure to keep safety appliances in order. But it is recognized that under the best liability law a large percentage of workmen must be without protection, as many accidents cannot be traced to legal fault on the part of the employer and may occur where safe-guarding appliances cannot be installed.

The workmen's compensation laws have improved the relations existing between the employer and workmen; they have had a marked effect upon accident prevention by calling attention to the subject and exciting interest in safeguarding machinery and in the organization of safety committees, and they have created a general campaign for accident prevention.

Litigation, so far as accidents to workmen are concerned, has been practically eliminated in the states in which compensation acts have been generally accepted by employers. About 2 per cent only of the compensation cases are disputed so as to require arbitration; not more than ten cases out of 10,000 compensation cases have gone into the courts.

Operation of Juvenile Court Laws

The first annual report of Miss Julia C. Lathrop, chief of the Children's Bureau, pertinently calls attention to a question which has been thus far ignored in the discussion of juvenile courts—the inequality of operation of the juvenile court laws. She says:

"A small group of the most conspicuous courts and those best equipped have been studied and their methods admired or criticized, but there has been little attempt to show the lack of provision for carrying out the laws which have been enacted and the undue confidence which has been placed in the bare existence of the laws, regardless of the fact that their true working inevitably presupposed costly nonpenal equipment; that is, judges and probation officers who are specially qualified, money at command for certain cases, and institutions for temporary or permanent care and teaching.

"For example, a state has a juvenile-court law applicable throughout the whole state. The juvenile court in the largest city of that state may be well equipped, with a judge giving his whole time to its administration, salaried probation officers, a comfortable detention home with necessary teachers, physicians for physical examinations, permanent state institutions for the care of exceptional children, and other costly equipment for ascertaining and serving the real needs of the children brought before it; while in remote counties of the same state every expedient for helping the child may be lacking, and though he is not regarded under the law as a criminal, he may be held pending trial in a jail little better than those described by John Howard, and at his hearing either turned adrift or dealt with as an adult criminal. The theory of probation, that is, protection and guidance of the child at home by means of probation officers, is an essential feature of juvenile-court law, yet it may not be in actual operation outside of one large city in a state of a hundred counties.

"Again, even where the probation theory of the law is carefully worked out and faithfully administered, the proper state institutions for the training and care of certain children may be lacking, and so the purpose of the law is defeated. For instance, into juvenile courts are brought many feeble-minded children who are plainly unable to protect themselves, who are a social menace at large; yet unless the state provides permanent institutional care for them they must be punished as responsible moral agents or placed in educational and reformatory institutions with normal children, to the demoralization of both classes, or allowed to go at large only to repeat in varying measure the history of the Jukes and the Kallikaks."

The law is the last result of human wisdom acting upon human experience for the benefit of the public.—Johnson.

Accident insurance — felon — injury. A felon caused by an accidental bruise upon the finger of the holder of an accident insurance policy is held in the Vermont case of Robinson v. Masonic Protective Asso. 88 Atl. 531, 47 L.R.A. (N.S.) 924, to be within the clause of the policy providing compensation for accidental injury resulting from some violent, external, and involuntary cause, leaving external and visible marks of a wound.

This appears to be a pioneer case upon the question.

Benevolent societies — secession of majority — property. The authorities are agreed that a majority of the members of a subordinate branch of a benefit association cannot, against the will of the minority, secede from the parent organization, and take with them the property of the subordinate branch.

The case of Grand Court of W. F. of A. v. Hodel, 74 Wash. 314, 133 Pac. 438, annotated in 47 L.R.A.(N.S.) 927, holds that the majority of a subordinate lodge of a benevolent society cannot authorize a secession of the lodge from the parent organization, and take with them the property of the order, if the general laws of the order provide that all property and funds of a lodge shall be held exclusively as a trust fund for carrying on the fraternal and benevolent features of the order, and shall not be expended for any other purpose, and that no part of the property shall ever be divided among the members, and if any lodge, for any reason, shall cease to exist, all its property shall immediately and *ipso facto* revert to the superior lodge.

Bills and notes — purchase by bank president — bona fide holder. The holding in McCarty v. Kepreta, 24 N. D. 395, 139 N. W. 992, annotated in 48 L.R.A. (N.S.) 65, that the president of a bank, who, in good faith and for full value, purchased from it a note without actual knowledge of the maker's equity, is not a bona fide purchaser without notice, because, by virtue of his position, he is affected with constructive notice, seems to be in harmony with the modern tendency to require close attention to duty on the part of corporate officers, but does not find much support in the few cases previously decided. On the other hand, it may be said that the cases apparently opposed to it do not involve the same facts, since the duties of a bank president in respect to commercial paper handled by the bank demand a higher degree of care than do those of officers of other classes of corporations. Hence, McCarty v. Kepreta may be regarded as the pioneer case upon that question.

Burglary — pushing open car door. The numerical majority of the cases favor the contention that, if a door be partly open, it is not a "breaking" to push the same further open. Indeed, the older cases were practically unanimous to this effect. In the later cases some of the courts have repudiated this rule as being unreasonable and illogical.

The recent Vermont case of State v. Lapoint, 88 Atl. 523, annotated in 47 L.R.A.(N.S.) 717, holds that pushing open a car door found ajar sufficiently to effect an entrance, and the entering into the car to commit larceny, is a sufficient breaking to constitute burglary.

Case — suicide — demand of resignation. A novel question was presented in the case of Stevens v. Steadman, 140 Ga. 680, 79 S. E. 564, 47 L.R.A.(N.S.) 1009, which holds the court erred in refusing to sustain a general demurrer to the petition in an action brought by a widow against the defendants to recover damages for the tortious homicide of her husband, it being alleged that the defendants, in pursuance of a conspiracy to bring about the death of the plaintiff's husband, had written a letter calling upon the decedent to resign his official position in a corporation of which he was vice president, and advising him not to inquire into the reasons for the demand; that, owing to the nervous condition of the decedent and his impaired mental and physical condition, this letter, which was delivered to and read by him, had the effect of causing him to take a portion of some narcotic or drug which caused his death, and that the defendants intended and knew that the letter should produce this effect and bring about the death of the decedent.

Charity — abandonment of church — application *cy près*. That the court cannot, upon the abandonment of the use of church property purchased by funds donated by members of the society, and its attempted sale by the surviving members of the congregation, require the application of the proceeds *cy près*, if no other organization or society exists which has the same purpose and religious belief as the society to which the property belonged, is held in People ex rel. Smith v. Braucher, 258 Ill. 604, 101 N. E. 944, annotated in 47 L.R.A.(N.S.) 1015.

Corporation — lease to secure business — ultra vires. A corporation organized to carry on a brewing business is held in the case of United States Brewing Co. v. Dolese & S. Co. 259 Ill. 274, 102 N. E. 753, annotated in 47 L.R.A.(N.S.) 898, to have no implied authority to rent land and to construct a saloon and boarding house near a quarry, although it will thereby increase the market for its product.

There is a conflict of authority as to the power of a brewing corporation to lease property to be used by retailers of its products, arising from the application of accepted general rules to the purposes of particular corporations as expressed in their charters.

Criminal law — error in name of juror — effect. The general rule is that a mere mistake as to the name of a juror in a criminal case does not constitute sufficient ground to warrant arresting the judgment or the granting of a new trial or a reversal, at least in the absence of material prejudice which could not have been avoided by the exercise of due diligence upon the impaneling of the jury.

The case of Com. v. Potts, 241 Pa. 325, 88 Atl. 423, annotated in 47 L.R.A. (N.S.) 714, holds that a true verdict in a criminal case will not be set aside because a juror was inadvertently given a wrong Christian name on the slip placed in the wheel, so that defendant's counsel investigated the qualifications of the wrong man, if the occupation and residence were correctly given, and no objection was made to him.

In Chadwick v. United States, 72 C. C. A. 348, 141 Fed. 225, a case almost identical as to facts and decision, it was held that a motion for a new trial made after verdict, and based on the ground that the given name of one of the jurors who served on the trial differed from the name on the jury list as drawn, the real name being "Bentley Crane," and the name drawn from the jury box being "Butler Crane," raised a question calling for the exercise of the discretion of the

trial judge, and that denial of such motion might well be made where it appeared that the juror who served was the one summoned and actually intended, that he appeared in good faith, and that the mistake was purely a clerical one, there being no person of the name on the list. The court did say, however, that if there had been wilful misconduct upon the part of anyone, or if there had been, in fact, one of the name drawn competent for jury service in the case, a serious question would have been raised, provided the defendant had been misled into accepting one juror when he had reasonable ground for believing that he was securing another.

Criminal law — second conviction — punishment. The act of the legislature providing that upon a second conviction for a violation of the prohibitory liquor law a higher punishment shall be inflicted is held in the Oklahoma case of Jones v. State, 133 Pac. 249, annotated in 48 L.R.A.(N.S.) 204, to be a reasonable classification which the legislature had the power to make, and it is not *ex post facto,* although by its terms it may be enforced against one whose former conviction occurred before its passage.

Damages — failure to select physician of highest skill. That the expense might have been minimized by the selection of a physician of higher skill to attend one injured by another's negligence is held in Hunt v. Boston Terminal Co. 212 Mass. 99, 98 N. E. 786, annotated in 48 L.R.A. (N.S.) 116, not to relieve the latter from liability to make good the expense incurred for such attention, if reasonable care was exercised in the selection of a physician and in following his directions.

Damages — personal injury — submission to operation. Where one has been injured, but is advised by competent physicians that the injury can be remedied by an operation that is ordinarily not dangerous, but refuses to submit to the operation, it is held in Donovan v. New Orleans R. & Light Co. 132 La. 239, 61 So. 216, annotated in 48 L.R.A.(N.S.) 109, that she is not minimizing her damages, and cannot recover for the sufferings which would be avoided by the needed operation. It is incumbent upon the injured person to submit to reasonable treatment, and to follow the advice of competent physicians.

Descent — share of grandchild — deduction of father's debts. That uncollectable debts due by a son who died in the lifetime of his father, to the latter, must be deducted in determining the amount which the son's children are entitled to take in the father's estate as representatives of the son, is held in the Mississippi case of Adams v. Yancey, 62 So. 229, 419, which is opposed to the weight of judicial opinion as appears from the cases gathered in the note which accompanies the report of the foregoing case in 47 L.R.A.(N.S.) 1026.

Druggists — sale of patent medicines — liability for purity. A druggist who holds himself out as the actual manufacturer of a patent medicine put up by a wholesaler with the retailer's name on the package is held not entitled in Wilson v. Faxon, 208 N. Y. 108, 101 N. E. 799, 47 L.R.A.(N.S.) 693, to the benefit of an exception in a statute making druggists responsible for the quality of medicine sold by them, except those sold in original packages of the manufacturer, and those articles known as patent or proprietary medicines.

Evidence — admission — report by agent — admissibility. Some courts have admitted in evidence reports of agents or employees for the purpose of affecting the principal with notice of, and to establish against him, relevant facts and existing conditions leading up to the cause of action, while others have limited the purpose to proving notice; in either case the report must have been required of the agent or employee, or made in the line of his duty.

In the Maine case of Warner v. Maine C. R. Co. 88 Atl. 403, 47 L.R.A.(N.S.) 830, it is held that a report by a station agent to the general manager of a railroad on the day after a fire had occurred at his station, in which he states the cause of the fire to have been sparks from a

locomotive, is not admissible against the railroad company in an action to hold it liable for the loss.

In this case the court disposes of the contention that the report was binding upon the principal as an admission, by showing that it was merely a narrative of a past transaction with the agent's opinion added; of the contention that it was part of the *res gestæ*, by pointing out that the agent had no part in the transaction that formed the basis of the cause of action; and of the assertion that the agent was required to make the report, by showing that the assertion was not proved, and even if it had been proved, no question of notice was involved, since the report was made after the alleged accident; and for the same reason, the report could not be admitted to show the relevant facts and conditions existing and leading up to the cause of action.

Exemptions — evasions — civil liability. A debtor's right of action against his creditor for collecting the debt in another jurisdiction in evasion of the exemption laws of their domicil is considered in the Indiana case of Markley v. Murphy, 102 N. E. 376, annotated in 47 L.R.A. (N.S.) 689, which holds that one who violates a penal statute forbidding the assigning of a claim against a wage earner out of the state for collection where employer and employee are both found in the state, and the wages are exempt from execution, is liable in a civil action for the damages thereby inflicted upon the wage earner.

Extradition — interstate rendition — trial for crime not charged. The long existing conflict between the different courts, as to the right to try a prisoner for other crime than that for which he was surrendered in cases of interstate extradition, was finally settled by the United States Supreme Court in Lascelles v. Georgia, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687. At least that case settled the point that a decision of the state court in the affirmative will not be disturbed by the United States Supreme Court on error, while state courts are doubtless free to apply a different rule, if they see fit. As a matter of fact in cases which have arisen since the Lascelles Case, it has been held, following that case, that one may be tried for an offense other than that for which he was extradited.

In Re Flack, 88 Kan. 616, 129 Pac. 541, annotated in 47 L.R.A.(N.S.) 807, it is held that a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, and who, on demand of the executive authority of the state from which he fled, shall be delivered up and removed to the state having jurisdiction of the crime, may there be prosecuted for crimes other than the one specified in the demand for his delivery, without first giving him a reasonable opportunity to return to the state which surrendered him.

Highway — driving blind horse — negligence. That one is not negligent *per se* in driving a gentle horse on the highway, although it is blind, so as to preclude his holding the county liable in case he is thrown over the edge of an unguarded bridge when he suddenly loses consciousness, if he had not lost consciousness before for a long series of years, is held in the Iowa case of Magee v. Jones County, 142 N. W. 957, annotated in 48 L.R.A.(N.S.) 141.

Highway — telephone wire — frightening horse — liability. A telephone company which has the right to maintain its line along a highway is held not liable in East Tennessee Teleph. Co. v. Parsons, 154 Ky. 801, 159 S. W. 584, 47 L.R.A. (N.S.) 1021, for injury caused by frightening the horse of a traveler by bright new coils of wire temporarily placed between the traveled part of the highway and the fence, to be used in stringing a new line on its poles, although they remain where placed for several days before the accident occurs.

Injunction — against nuisance — statutory misdemeanor. That an injunction lies against the pollution of a stream in such a manner as to constitute a public nuisance, although such pollution is by statute made a misdemeanor punishable by

fine or imprisonment, is held in Com. v. Kennedy, 240 Pa. 214, 87 Atl. 605, 47 L.R.A.(N.S.) 673.

Injunction — against publishing petition. The question whether the publication of a person's name as signer of a petition may be enjoined after repudiation of the petition by him seems to have arisen for the first time in the Louisiana case of Schwartz v. Edrington, 62 So. 660, 47 L.R.A.(N.S.) 921, which holds that the provision in the state Constitution that "any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty," does not include the right to publish what purports to be a signed petition, as expressing the sentiments, not of the publisher, but of the signers, after the signers have disowned and repudiated it, as having been signed under a misapprehension; and the continued publication of the names of such signers, in that connection, may be enjoined, and the parties violating the injunction may be punished for contempt of the court by which it was issued.

Insurance — arbitration — right to introduce evidence. Where a fire insurance policy provides that in the event of loss, if the insured and the company fail to agree as to the amount of loss, it shall "be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the ap-appraise the loss, stating separately sound appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss," it is held in the Oklahoma case of Ætna Ins. Co. v. Jester, annotated in 47 L.R.A.(N.S.) 1191, that the insured has the right, if he demands it, to introduce evidence before the appraisers as to the extent of his loss, and, where he is refused permission, upon demand, to introduce evidence the award is not binding upon him.

Insurance — employers' liability — time of notice. The holder of an employers' liability insurance policy which provides that, upon occurrence of an accident, he shall give notice thereof to the insurer immediately, and at the latest within ten days, is held not required to give such notice before he himself receives it, in John B. Stevens & Co. v. Frankfort Marine Acci. & Plate Glass Ins. Co. 207 Fed. 757, and reported in 47 L.R.A. (N.S.) 1214, where it is accompanied by the recent cases on the subject.

Judgment — default — motion to secure costs. The case of Naderhoff v. George Benz & Sons, 25 N. D. 165, 141 N. W. 501, 47 L.R.A.(N.S.) 853, in holding that a pending motion for security for costs does not prevent the entry of a judgment by default, has the support of the authorities.

Judgment — revivor — in favor of state. There seem to be few authorities upon the question as to whether the rules in regard to dormancy and revival of judgments apply to a judgment in favor of the state. The weight of authority supports the decision in the case of State v. Dixon, 90 Kan. 594, 135 Pac. 568, 47 L.R.A.(N.S.) 905, which holds that the Code provision limiting the time within which a revivor of an action or judgment must be had in case of the death of one or more of the parties thereto does not include the state or apply to it, and, in order to keep alive a judgment in favor of the state perpetually enjoining the maintaining of a common nuisance under the prohibitory liquor law on certain premises, and adjudging that the attorneys' fees and costs in the case be a lien thereon, it is not necessary that an execution be issued upon the judgment within five years from the rendition of it, as is required to prevent dormancy of an ordinary judgment.

But the general rule that statutes of limitations do not run against the government has been said not to apply where the mischiefs to be remedied are of such a nature that the state must necessarily be included, where the state goes into business in concert or in competition with her citizens, or where a party seeks to enforce his private rights by suit in the name of the state or government, so that the latter is only a nominal party.

Judicial sale — right of bidder — laches. While a bona fide bidder at a sheriff's sale, who is able to comply with his bid, is held in the case of Hardin v. Adair, 140 Ga. 263, 78 S. E. 1073, annotated in 47 L.R.A.(N.S.) 896, to have a right, where his bid is wilfully disregarded by the officer offering the property for sale, to go into equity for the purpose of compelling a resale of the property, and to have the sale resumed at the point of his bid, provided such bidder acts with reasonable promptness, yet, if he delays for an unreasonable time, and is thereby guilty of laches, equity will interpose a bar to his action. A delay of two years after the sale, before the bringing of the suit to compel a resale, shows a lack of due diligence and an unreasonable delay.

Landlord and tenant — termination of tenancy — tearing down to rebuild. A lease authorizing the landlord to terminate the tenancy in the event that he shall "tear down to rebuild the building" is held in Nicolopole v. Love, 39 App. D. C. 343, annotated in 47 L.R.A.(N.S.) 949, not to authorize a termination to enable a subsequent lessee to tear down to rebuild.

Larceny — abstracting money from letter. Abstracting and appropriating to his own use, money from a sealed letter intrusted to him to mail, is held in the North Carolina case of State v. Ruffin, 79 S. E. 417, 47 L.R.A.(N.S.) 852, to render one guilty of larceny.

There is very little authority upon this question.

Master and servant — competent fellow servant — complaint — effect. Where two employees in a factory are associated in operating a machine therein, and one complains to the master that he is afraid to work with the other, and the master replies that the one complained of is incompetent and careless, and that he will place him on some work where he cannot hurt the one complaining, it is held in Delmore v. Kansas City Hardwood Flooring Co. 90 Kan. 29, 133 Pac. 151, that the one complaining may thereafter continue in the employment for a reasonable time without assuming the risk of injury from the negligence of his fellow laborer.

The cases on this subject are not numerous, but for the most part they hold that the so-called promise to repair applies where a promise is made to remove an incompetent employee to the same extent and with the same limitations as where the promise is made with respect to a defective tool or appliance.

The recent decisions are appended to the foregoing case in 47 L.R.A.(N.S.) 1220, the earlier adjudications having been gathered in a note in 10 L.R.A. (N.S.) 1043.

Master — contributory negligence — custom — illegality. The first case dealing with the question of the contributory negligence of a servant in failing to guard himself against the consequences of a negligent custom followed by the other servants appears to be Cincinnati, N. O. & T. P. R. Co. v. Lovell, 141 Ky. 249, 132 S. W. 569, 47 L.R.A.(N.S.) 909, which holds that the existence of a custom among switching crews in a yard to couple to standing cars whenever they interfere with the movement of cars being handled by them, without notice to persons who may be about them, or any attempt to ascertain whether their employees are in danger, does not render a member of a switching crew negligent in going between standing cars which he is attempting to move from the main track to effect a coupling, without setting signals against other crews, since the custom is illegal because involving a reckless disregard of human life.

Master and servant — injury by automobile — act of chauffeur — liability of owner. The owner of an automobile is held not liable in the Maryland case of Symington v. Sipes, 88 Atl. 134, 47 L.R.A.(N.S.) 662, for an injury caused by collision of the car with a vehicle on the highway while the car is in charge of a chauffeur who, having been directed to take it to the garage, uses it for a pleasure drive for himself and his friend.

Mechanics' lien — right of architect. An architect is held in the Washington case of Gould v. McCormick, 134 Pac. 676, 47 L.R.A.(N.S.) 765, to have a lien on a building for furnishing plans for it

and superintending its construction, under a statute providing that every person performing labor upon or furnishing material for a building has a lien upon the building therefor.

The right to a mechanics' lien is not lost by claiming an excessive amount in the notice, if it was not done wilfully or in bad faith.

Mortgage — failure to renew — effect on junior encumbrancer. In the Oklahoma case of First State Bank v. King & McCants, 133 Pac. 30, annotated in 47 L.R.A.(N.S.) 668, A took a mortgage on certain chattels in 1908, upon which there was at the time a prior, valid, properly registered mortgage in favor of K. & M. At the time the controversy arose between these parties over the property, the lien of K. & M. had expired as to "subsequent purchasers or encumbrancers of the property in good faith, for value," because of a failure to file a renewal affidavit. Held, that A, having taken his mortgage with notice of the lien of K. & M., never became, as to K. & M., a "subsequent encumbrancer of the property in good faith, for value."

The weight of authority holds that the failure to refile the chattel mortgage, properly filed and recorded in the first instance, does not defeat it as against a purchaser or encumbrancer who became such before the expiration of the period for refiling, although he may not have had actual notice. In other words, to be a subsequent purchaser or encumbrancer in good faith, entitled to protection in the event of the failure to refile within the time required by statute, one must have made the purchase or taken the encumbrance after the expiration of the period allowed by the statute for refiling.

Municipal corporation — contract for street paving — effect of agreement with street railway. A question which apparently has but once previously come directly before the courts was considered in the California case of McNeil v. South Pasadena, 135 Pac. 32, 48 L.R.A.(N.S.) 138, which holds that a contract by a street railway company in consideration of a franchise to operate cars in a city street, to pave a certain portion of the street, does not deprive the municipality of power to contract for the laying of a pavement upon the entire surface of the street.

Municipal corporation — jurisdiction over boundary river. A municipal corporation bounded by a navigable river is held in Treuth v. State, 120 Md. 257, 87 Atl. 663, annotated in 47 L.R.A.(N.S.) 1161, to have no jurisdiction over the sale of intoxicating liquor on a pavilion erected on spiles driven into the soil of the river, and reached from the shore only by boat or a float fastened by ropes one of which is attached to a bulkhead on the shore.

Negligence — contributory intoxication. Voluntary intoxication does not excuse one from the duty to use the same degree of care and prudence to protect himself against danger that is required of a sober man under the same circumstances, *i. e.*, ordinary care.

So, it is held in McIntosh v. Standard Oil Co. 89 Kan. 289, 131 Pac. 151, annotated in 47 L.R.A.(N.S.) 730, that upon the issue whether, at a particular time, a person was exercising due care for his own safety, evidence that he was intoxicated is ordinarily admissible, not as constituting or conclusively establishing negligence on his part, but as being a circumstance to be considered in determining the matter.

Negligence — unsafe premises — artificial lake — drowning of child. A railroad company which has created a shallow lake in a woods near a town by damming a water course is held not liable in the Mississippi case of Thompson v. Illinois Cent. R. Co. 63 So. 185, for the death of a child who, while wading in the lake, steps into a deep hole and is drowned, although it is charged with notice that children resort there to play.

The recent cases on the attractive-nuisance doctrine as applied to ponds accompany the foregoing decision in 47 L.R.A.(N.S.) 1101, the earlier adjudications having been gathered in a note in 19 L.R.A.(N.S.) 1143.

Obstructing justice — what constitutes — effect of motive. Where an officer seizes personal property upon attachment and delivers it to a custodian to be held subject to his order, a stranger to the writ who claims to own the property, and makes demand for it upon the custodian, is held in the case of State v. Tannyhill, 90 Kan. 598, 135 Pac. 674, annotated in 47 L.R.A.(N.S.) 1146, not guilty of obstructing the execution of process, whatever his motives may have been, where he employs no deceit, and the property is voluntarily delivered in response to his demand.

Oil and gas — injury to well — right of lessor. The lessor in an oil and gas lease guarantying to him the payment of rental for gas wells, and a supply of gas for his mansion house from the same, is held in the West Virginia case of Atkinson v. West Virginia Oil & Gas Co. 79 S. E. 647, to have a right of action at common law, and also by virtue of the provisions of chapter 62d of the Code of 1906, for injury to a producing and paying gas well on his premises by the percolation of water into the gas-bearing sand from an abandoned well on adjacent land, consequent upon the failure of the owner of such abandoned well to plug it, or adopt any means or measures for the prevention of such injury to the neighboring well of the lessor.

The cases on injury to a gas or oil well from acts done on neighboring premises are gathered in a note accompanying the foregoing decision in 48 L.R.A. (N.S.) 167.

Partnership — dissolution — ill health. Incapacity, by reason of a stroke of paralysis, of a partner, for a period of three years and eleven months out of a partnership period of four years and eleven months, to attend to the duties of the partnership, is held in Barclay v. Barrie, 209 N. Y. 40, 102 N. E. 602, annotated in 47 L.R.A.(N.S.) 839, to be ground for dissolution at the suit of the other partner, although there has been a progressive recovery, and it is found that he will be practically restored to health by the expiration of the contract period of the partnership.

Prosecuting attorney — assistant — appointment. Where, in a criminal prosecution, an application is made to the district court for the appointment of an assistant prosecutor, if the court finds that such an appointment should be made, it is held in Flege v. State, 93 Neb. 610, 142 N. W. 276, annotated in 47 L.R.A. (N.S.) 1106, that no attorney should be appointed who is known to be a partisan as against the accused, and who has theretofore been employed and paid by another suspected person, and for whom he has appeared in the preliminary examination and in a former trial of the accused in the district court, taking an active part in both trials for the purpose of protecting his suspected client. Under such an appointment a fair and impartial trial of the accused person could not be reasonably expected.

Proximate cause — sarcoma — injury on street. That a defect in a street because of which a pedestrian receives a slight injury cannot be found to be the proximate cause of sarcoma, necessitating the amputation of his leg, since such result could not have been foreseen, is held in Allison v. Fredericksburg, 112 Va. 243, 71 S. E. 525.

This case is accompanied in 48 L.R.A. (N.S.) 93, by the decisions on the extent and character of developments, following a personal injury, for which the person inflicting the injury is liable.

Railroad — duty to furnish telegraph facilities. The few authorities on the subject hold that a railroad company, not engaged in the telegraph business for commercial purposes, is not required to maintain a telegraph station for such purposes.

So, it is decided in the New Mexico case of Woody v. Denver & R. G. R. Co. 132 Pac. 250, 47 L.R.A.(N.S.) 974, that while a railway company under the Constitution may be required to provide and maintain "adequate depots, stock pens, station buildings, agents, and facilities for the accommodation of passengers and for receiving and delivering freight and express," and can, upon a proper showing, be required to maintain a telegraph station and agent for the accommodation of

passengers and for receiving and delivering freight and express, it cannot, independent of its duties as a common carrier, be required to furnish telegraph facilities so that the public may commercially derive conveniences therefrom.

Railroad — highway crossing — obstruction — statutory prohibition — effect. The statute making it a misdemeanor for a railway company to allow cars to stand upon a street for more than ten minutes at a time, in such a way as to reduce the opening in the traveled part thereof to less than 30 feet, is held in the case of Denton v. Missouri, K. & T. R. Co. 90 Kan. 51, 133 Pac. 558, 47 L.R.A.(N.S.) 820, to be intended to prevent obstructions to travel, and acts in violation thereof do not necessarily constitute negligence for the purposes of an action in which the plaintiff relies upon the fact that the position of the cars, by obscuring his view of the track, prevented his seeing an approaching engine in time to avoid a collision.

Receiver — property in custody of stranger — rights — determination. The general rule that a receiver cannot ordinarily, through summary proceedings, take into custody property found in the possession of strangers to the record claiming adversely, finds support in the New Mexico case of State ex rel. Parsons Min. Co. v. McClure, 133 Pac. 1063, annotated in 47 L.R.A.(N.S.) 744, which holds that a receiver cannot ordinarily take into custody property found in possession of a stranger to the record, claiming title. But where such stranger intervenes in the receivership proceedings, and submits his rights to the court for adjudication, he is not entitled to a writ of prohibition to restrain the court from determining those rights.

Tax — commercial agency — interstate commerce. A subject which seems to have been considered in but one earlier case was presented in United States Fidelity & G. Co. v. Com. 139 Ky. 27, 129 S. W. 314, annotated in 47 L.R.A.(N.S.) 648, which holds that the business of maintaining attorneys in various sections of a state, to make collections for and furnish information to merchant customers as to the financial standing of persons in the vicinity of such attorneys, is not, although it may require the sending of letters from state to state, interstate commerce so as to exempt the proprietor from paying a license tax imposed by the state.

This case was affirmed in 231 U. S. 394, 58 L. ed. —, 34 Sup. Ct. Rep. 122, where the court, after distinguishing McCall v. California, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881 (as relating to an agent whose business was the direct solicitation of passengers for interstate journeys by rail), and International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103 (as relating to trade in text-books, etc., for courses of study pursued by means of correspondence), said: "In the present case it appears that there is not even systematic or continuous correspondence, much less interstate commerce resulting therefrom. There is no direct or necessary connection between the service performed by the plaintiff in error through its representatives and the making or fulfilment of commercial contracts. The most that can be said is that inquiries received by those representatives in Kentucky, with respect to the credit and standing of persons engaged in business in that state, may be received from merchants without the state in anticipation of commercial transactions between them in future. But, on the other hand, similar inquiries may be received from merchants in Kentucky, and may have reference alone to intrastate, and not to interstate, transactions. Or, the information may be desired as an aid in extending or refusing to extend credit for past transactions, as well as to lay the basis for future dealings. The circumstances that, in a substantial number of cases,—even if in the greater number,—there is correspondence, by letter or otherwise, from state to state, which may, perhaps, have an effect upon the conduct of other parties about entering or not entering into transactions of interstate commerce, is not controlling. The present case has no close parallel in former decisions, but in

some of its aspects it bears a resemblance to the case of a tax imposed upon a resident citizen engaged in a general business that happens to include a considerable share of interstate business (Ficklen v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810); or the business of the live-stock exchange that was under consideration in Hopkins v. United States, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40; or the business of a cotton broker dealing in futures or options (Ware v. Mobile County, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031). To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial. We do not think the present is such a case."

Taxes — license — purchaser at tax sale. The first case construing a statute requiring a license to purchase property at tax sales is Com. v. Hazel, 155 Ky. 30, 159 S. W. 673, 47 L.R.A.(N.S.) 1078, which holds that taxes assessed by a county are within the operation of a statute imposing a license tax on persons who purchase to a specified amount land sold for taxes "due this commonwealth."

That imposing a license tax on persons who purchase at a tax sale to the amount of $500, without taxing those who purchase a less amount, is not an unreasonable classification.

That the fact that a purchaser at a tax sale does so under agreement with the owners of the property, by which they shall have a right to redeem, does not exempt him from the license tax on persons who purchase at such sales to a specified amount.

Trademark — periodical — application to moving picture — infringement. A registration as a trademark of a name applied to a periodical devoted to the publisher of a periodical series of stories, is held in Atlas Mfg. Co. v. Smith, 122 C. C. A. 568, 204 Fed. 398, annotated in 47 L.R.A.(N.S.) 1002, not to prevent the application of the name to moving picture plays which deal with adventures similar to those of the hero of the published series, who bears the name applied to the periodical.

Nor does the doctrine of unfair trade apply to prevent the application to a moving-picture play of a name which has been applied for a long series of years by the publisher of a periodical series of stories, to the pamphlet containing such stories, although the incidents of the play are similar in character to those depicted in the periodical, if they are not based on the published stories.

A case of interest upon this subject is Glaser v. St. Elmo Co. 175 Fed. 276, holding that where a copyright of a novel has expired, any person may write a play based thereon, and may use the title of the novel to designate the play, provided he gives plain notice as to the authorship of the play; and that a purchaser of dramatic rights who uses the name to designate a play based upon the novel is not entitled to restrain the use of the same name to designate a different play, although based upon the plot and incidents of the novel, where the writer of the latter play clearly indicates the authorship.

Water — duty to supply everyone within district. It is the general rule that each inhabitant of a municipality has the right, upon complying with all reasonable regulations, to have the service of a public-service corporation supplying such municipality extended to him, and this without unjust discrimination.

The question, however, as to what particular circumstances require the service to be extended, or, on the other hand, relieve the company or municipality from extending its service, is one not so easy of solution, as the above-stated general rule is clearly not applicable in some cases. In the majority of cases the decisions are influenced or directly controlled by the charter or franchise under which the duty, if any, arises.

Thus, in some instances it has been held that there is no duty to extend water mains where the cost thereof and the return therefrom would be greatly disproportionate. Of this nature is the Maine case of Lawrence v. Richards, 88 Atl. 92, annotated in 47 L.R.A.(N.S.) 654, which holds that a district organized to supply

its inhabitants with water is not bound to furnish a supply to everyone that demands it, regardless of the expense involved and the returns which will result in so doing, especially where the statute provides that water rates shall be established sufficient to provide for such extensions and renewals as become necessary.

Water — right to use for railroad purposes. A railroad company owning land on a stream is held in Scranton Gas & Water Co. v. Delaware, L. & W. R. Co. 240 Pa. 604, 88 Atl. 24, 47 L.R.A.(N.S.) 710, to have no right as against the lower riparian owners to pump the water into a reservoir several miles distant, for general railroad purposes, such as use in locomotives, shops, and stations.

The earlier cases on the right of a railroad company as riparian owner to take water from a stream for its engines are gathered in a note in 31 L.R.A.(N.S.) 543.

Will — dispositions of non-resident witnesses. While the interrogatories or depositions of attesting witnesses who reside beyond the jurisdiction of the court may be taken, it is held not necessary in the case of Wells v. Thompson, 140 Ga. 119, 78 S. E. 823, annotated in 47 L.R.A. (N.S.) 722, to take them if the will can be proved by other legal and satisfactory evidence.

Recent English and Canadian Decisions

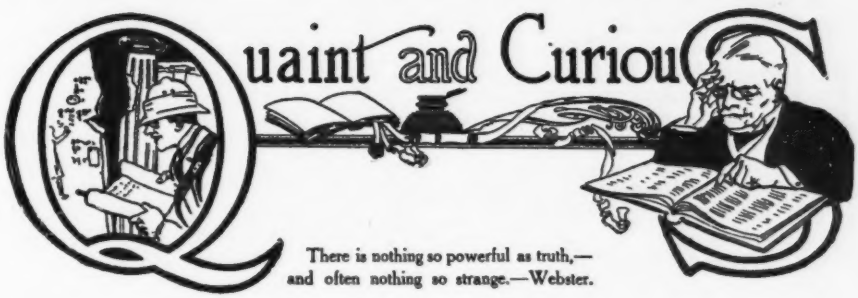
[Note.—The more important of these decisions will be reported, with full annotation, in British Ruling Cases.]

Fixtures — hire-purchase agreement — right of seller as against receiver in debenture holders' action. The seller of a machine installed as a fixture under a hire-purchase agreement is entitled to enter and remove it notwithstanding the appointment of a receiver in an action brought by the holders of debentures forming a floating charge upon the property and business to enforce their security, although the debenture holders had no notice of the agreement. Re Morrison, Jones & Taylor, 83 L. J. Ch. N. S. 129.

Perjury — oath — mode of admission. Owing to the mistake of the reporter of Rex v. Curry, 47 N. S. 176, in stating that the conviction therein was quashed, when as a matter of fact it was affirmed, the supreme court of that province has been erroneously represented in these columns as holding that one who was sworn as a witness, without any objection on his part, by raising his right hand instead of kissing the Bible, could not be convicted for perjury in respect of false testimony given by him,—whereas the decision of the majority of the court was to the contrary. A recent decision of the supreme court of Canada, Curry v. Rex, 48 Can. S. C. Rep. 532, corrects the reporter's misstatement and affirms the conviction.

Set-off and counterclaim — action on note of directors — warranty of goods sold to corporation. A set-off or counterclaim for breach of warranty of machinery sold to a corporation is not available to its directors in an action on a note given by them in renewal of the corporation's note for the purchase price of the machinery, of which they were indorsers. Allis-Chalmers-Bullock v. Hutchings, 41 N. B. 444.

Will — construction — gift to nephews and nieces — right of nephews of husband of testatrix to participate. The fact that a testatrix in appointing three persons as executors of her will, one of whom was her own nephew, and two, nephews of her first husband, characterized them as "my nephews," will entitle neither nephews and nieces of the husband generally, nor the two nephews of the husband named as executors, to participate in a gift of the residuary estate upon trust for division "between my nephews and nieces living at the time of my decease" and the children then living of predeceased nephews and nieces. Re Green [1914] 1 Ch. 134.



There is nothing so powerful as truth,—
and often nothing so strange.—Webster.

Great Men's Eyes. It seems that at last genius is discovered not to be allied to insanity, but that rather all its eccentricities are due to eye strain.

Brain specialists, for instance, are asserting that if Carlyle had had properly adjusted glasses and a good electric light to work by, instead of skylight over his desk, and that illumined by a London fog much of the time, he would not have been such a grumbler and dyspeptic; in fact, eye strain was the cause of all his eccentricities.

All geniuses, in fact, would have been optimistic, says science now, if they had only had bifocal glasses at the right time. The same abnormal eyesight is given as the cause of many tragic paintings. That famous artist, Turner, would never have painted the slave ship in a storm, but would rather have depicted the peaceful landscapes that so many artists paint when their eyes are properly fitted with glasses.

Wagner, too, if he had worn the correct spectacles and had had that decided tilt to one eye remedied, probably would never have written about Walkyrie and dragons, but would have written pleasant dances, and even ragtime, instead.

Darwin also was another victim of eye strain. Doubtless he would never have given to the world his theory of evolution which stirred society up if his eyes had been normal.

De Quincey suffered from bad eyes. Surely he would never have taken opium if he had had glasses; but, then, on the other hand, the world would have missed his opium dreams. And, after all is considered, scientists conclude society could better dispense with spectacles than with geniuses.—Tit Bits.

Deed Subject to Prior Conveyance. They say there is nothing new under the sun, writes Mr. J. R. Pottle, of Albany, Georgia, but a few days ago in examining a title here in this county I ran across a deed conveying a large plantation and containing the following reservation, "This sale to be subject to be controlled, as far as it goes, by temporary conveyances of said lands made to one Joe Jeffries and John Johnson by myself and wife, C.E.D., about the year 1878. (See 68 Ga. 370, and 81 Ga. 120.)"

Synonyms. In a case recently heard in the supreme court of Utah, the defendant had been convicted of selling intoxicating liquors to an Indian in violation of the provisions of § 4298 of the Compiled Laws of Utah 1907, making the offense a felony. In the appeal the defendant contended that the act of the state legislature of March 20, 1911, §§ 30 and 35, made the same offense a misdemeanor and operated the repeal of the former law. The former law uses the words, "intoxicating drink." The latter statute uses the words, "intoxicating liquors." The following gem occurs in the brief of the appellant:

"If one referred to or mentioned an intoxicating herb or an intoxicating powder, there might be some room for differentiation, but there is no twilight zone between intoxicating liquor and intoxicating drink, and they fit over one another as synonyms like the proverbial paper on the wall."

A Model Plea. We are indebted to Mr. Ernest Blue of the Class of 1913, Willamette University, College of Law, for a copy of the following pleading, which was composed and signed by the class and read at a banquet tendered the faculty:

In the Superior Court of Confidence for the Realm of Friendship.

The Faculty of Willamette University, College of Law, Plaintiff vs. The Class of 1913, Defendant.	Confession and Avoidance

Come now the said defendants by their attorneys, and defend the wrong and injury, when and where it shall behoove them, and the damages, and whatsoever else they ought to defend and admit that after covenant made by and between plaintiff and defendants aforesaid, plaintiffs gave to defendants freely of their time, counsel, knowledge and painstaking advice much and unmeasured to the advancement of the said defendants; admit that said defendants in manner and form as aforesaid have failed to evidence due and fitting appreciation of the efforts of plaintiffs in their behalf made; but say that defendants at all times heretofore mentioned have held, and do now hold, said plaintiffs in highest honor and esteem; that said defendants recognize and are most deeply thankful for and sincerely appreciative of the great kindness and invaluable service of plaintiffs; that throughout their lives they, and each of them, will hold said plaintiffs in heartfelt and grateful remembrance and will at all times yield to them their loyal and unadmeasured reverence and respect. And this the said defendants are ready to verify.

Making One's Own Will. "I read 'the Van Zandt Will,' in the February CASE AND COMMENT, with interest and amusement," writes Mr. E. Vine Hall, of London, England. "The idea which Van Zandt shared with his friend Clippenger, that no lawyer was necessary in the preparation of his will, reminds me of an extract which I recently made from the will of one William Clark, of Cheapside, in the city of London. He begins thus: 'As I never had any great predilection in favor of lawyers, and have lately met with an instance of singular ingratitude from one of the tribe in my native county, which has determined me to make my own will, I hope it will be as clearly understood as if it was drawn in all their absurd forms and legal nonsense. . . . I flatter myself that I have been so clear and explicit that my intentions cannot be misunderstood, but should any difficulty arise let it be construed in favor of my beloved little boy, John Weatherell, to whom I can only wish further that I had thousands to leave as he would certainly be my heir; and now I have only to declare this to be my last will and testament, which I do the thirteenth day of June in the year of our Lord one thousand eight hundred and four.'

"Curiously enough, in to-day's Daily Telegraph, the following account is given of a case heard in the chancery division before Mr. Justice Eve:

'Although he was the author of the text-book "Beven on Negligence," the late Mr. Thomas Beven, barrister, left testamentary dispositions in regard to which ten questions were put forward for determination by the court. On counsel for Mr. Septimus Beven, a brother and executor of testator, mentioning the purpose of a motion, his Lordship remarked: "This is Beven on Negligence isn't it? I hope he was not negligent in making his own will."

'Counsel: "I am afraid he was, as a matter of fact."

'In disposing of the questions, his Lordship said it was unfortunate that an eminent lawyer like Mr. Beven had not got somebody to settle his will for him. It would have saved the beneficiaries a considerable amount of trouble and expense.' "

Kill the Squirrel. "The real winner in life, after all," writes Judge J. W. Donovan, "is one who, with a single plan and purpose, holds to his point and duty to the end. Most people have too many aims.

"An excellent example is in the story of a lawyer selecting a clerk. The lawyer put a notice in an evening paper, saying that he would pay a small stipend to an active office clerk. Next morning his office was crowded with applicants,—all bright and many suitable. He bade them wait in a room until all should arrive, then ranged them in a row and said he would tell a story, and note the comments of the boys, and judge from that whom he would engage.

"'A certain farmer,' began the lawyer, 'was troubled with a red squirrel that got through a hole in his barn, and stole his seed corn, and he resolved to kill that squirrel at the first opportunity. Seeing him go in at the hole one noon, he took his shotgun and fired away; the first shot set the barn on fire.'

"'Did the barn burn?' said one of the boys.

"The lawyer without answer continued. 'And seeing the barn on fire, the farmer seized a pail of water and ran to put it out.'

"'Did he put the fire out?' said another.

"'As he passed inside the door shut to, and the barn was soon in full flames, when the hired girl rushed out with more water.'

"'Did the hired girl burn up?' said another boy.

"The lawyer went on without answering, 'Then the old lady came out, and all was noise and confusion and everybody was trying to put out the fire.'

"'Did they all burn up?' said another.

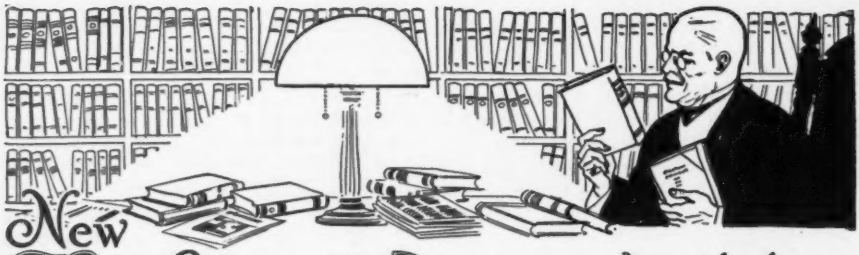
"The lawyer, hardly able to restrain his laughter, said: 'There, there, that will do. You have all shown great interest in the story; but observing one little bright-eyed fellow in deep silence, he said, 'Now, my little man, what have you to say?' The little fellow blushed and stammered out: 'I want to know what became of that squirrel. That's what I want to know.'

"'You will do,' said the lawyer, 'you are my man! You have not been switched off by a confusion and a barn's burning and hired girls and water pails; you have kept your eye on the squirrel.'"

This story is full of excellent advice to beginners, with a few good hints to older people. In every calling there is, or should be, one squirrel to kill, and no more."

A Musical Policeman. Hermann Finck and one of our rising novelists were waiting for a taxicab one Saturday night, and the novelist would insist on whistling to the musician a melody which he had composed himself. "It seems all right," said Finck, "but let's try it on the policeman." A tall young constable listened gravely as into either ear the novelist and the composer whistled the newborn melody. Then he pronounced judgment. "There is something to be said for the motif," he declared, "but the accidentals in the fifth bar are feeble, and the modulation into the minor at the tenth bar must offend the ear of any well-trained musician." And humming a fragment of "Parsifal" the musical constable went back to regulate the traffic at Piccadilly Circus.—From the London Express.

Policemen in Top Hats. Savona, Italy, is probably the only town in the world where policemen wear top hats. One cannot help wondering what the policemen's "toppers" look like after the officers have had a rough-and-tumble with hooligans. Perhaps, however, Savona lives up to the level of respectability indicated by the silk hats, and does not possess hooligans!—Wide World Magazine.



New Books and Recent Articles

Literary men are a perpetual priesthood.—Carlyle.

"Commentaries on the Law of Evidence in Civil Cases." By Burr W. Jones. Rewritten and enlarged by L. Horwitz. (Bancroft-Whitney Company, San Francisco) 5 vols. Library edition $33.00 net. Edition de Luxe $37.50.

The author of this justly popular work, shortly after the publication of the first edition, began writing a more elaborate treatise or commentary. After much material had been collected and arranged, other duties intervened, and the task of completing the work was assigned to Mr. Louis Horwitz, of the San Francisco Bar, formerly associated with Honorable A. C. Freeman as an assistant editor of the American State Reports.

The primary object of this treatise was to furnish a convenient text-book for trial lawyers, stating tersely the rules of law governing trials in civil cases. The revision has been made in the spirit of the original writer. As Mr. Horwitz states: "These commentaries do not run in any extravagant or ultra-scientific garb. They are dressed in the plainest homespun—they are for working purposes for work-a-day men (for the busy lawyer is a hard-worked workingman); and if they abound with case and illustration, it is that the man who seeks may find."

The commentaries will be found to be framed specially with a view of placing at the disposal of the busy lawyer, in the most practical form, the law as it stands to-day. Historical references have been sparingly used.

Among the commendable features of this exhaustive, scholarly, and convincing work we note the valuable cross-references from and to every title requiring the same. The very latest authorities are included. The United States Supreme Court cases are cited to support every proposition to which they relate. Parallel references are given to the American Decisions, American Reports, American State Reports, American Annotated Cases, American and English Annotated, National Reporter System, and the English Reprint.

Almost 60,000 cases have been examined in the preparation of the work. Careful selection has given to each state as many pertinent authorities from its own jurisdiction as possible.

Mr. Horwitz has performed his task with skill and ability. The text is clear, concise, and accurate, and the writer's mastery of the subject is shown by an easy and graceful style, from which the reader may derive intellectual enjoyment as well as instruction.

"Law and Practice of Bankruptcy." By Henry Campbell Black (Vernon Law Book Co., Kansas City, Mo.) $9.00 delivered.

This branch of the law which has now been illustrated by a great body of case law, covering almost every practical phase of the subject, has finally taken shape into a well-defined system.

This system, in all its branches and all its details, is the subject-matter of this book. It is a comprehensive treatise containing not only an elaborate discussion of all of the steps in a bankruptcy case, and the matters usually found in treatises on this subject, but it also gives special treatment in separate chapters of such matters of great practical importance as the rights and liabilities of secured creditors, rights of the trustee as against a prior assignee for creditors, fraudulent and voidable conveyances, the bankruptcy of corporations, and the complex rules prevailing in the bankruptcy of a partnership.

Not only are all the decisions under the act of 1898 included, but also the very great number of rulings under the acts of 1841 and 1867 which still retain their importance and authority.

The appendix contains the bankruptcy act of 1898, the act of 1867, and the general orders and official forms, with exhaustive annotations.

The distinguished author has been a close student of the subject for more than twenty years, beginning his investigation long before the enactment of the present statute. He has embodied the entire results of his long study and research in this volume, which will receive the kindly consideration of the profession.

"Landmarks of a Lawyer's Lifetime." By Theron G. Strong. (Dodd, Mead, & Co., New York) $2.50 net.

This volume is filled with interesting remi-

niscences concerning personages and events at the bar of the city of New York during the past forty years. The author, himself a prominent member of that bar, is able to speak from personal experience of judges and practitioners who, during that period, were eminent in their profession.

His account, replete with incident and anecdote of an earlier generation, forms a charming contribution to the literature of the law. Its earlier portion relates characteristics of some "old-time lawyers," men whose accurate knowledge and unlimited industry gained them enviable places in the profession. The author gives his memories of former members of the New York court of appeals; of notable appellate justices and other judicial personages; of Mr. Justice Field and such leaders of the bar as William M. Evarts, Charles O'Conor, George F. Comstock, John K. Porter, James C. Carter, and William A. Beach. A chapter is devoted to that dramatic figure, William F. Howe, and another describes that "unique trio," "Count Johannes," Barrister Nolan, and Edwin James, Q. C.

The book contains many practical suggestions of especial value to the younger members of the profession. The modern lawyer, the modern law office, sources of business and fees, regular and contingent, are among the subjects treated.

It is fortunate that Mr. Strong has preserved in print these memorials containing much of interest and value that might otherwise be irretrievably lost. They are replete with the humor and amenities of the law, and throw interesting side lights upon the characteristics of many eminent men. They present biography and history in their most entertaining form.

"Liability of Stockholders for the Debts of California Corporations." By Fabius M. Clarke, (Recorder Printing and Publishing Co., San Francisco) 50 cents.

This pamphlet is devoted to a subject which it is believed is not specially covered elsewhere.

California still adheres to the policy of the old laws which once prevailed in other parts of the country, making stockholders of a corporation organized in that state individually liable for the total amount of the debts of the corporation; holding also that this liability is primary, not secondary, and that a creditor may sue the stockholder without first having sued or obtained judgment against the corporation.

Many enterprises in that state are of a nature which attract investors in other parts of the United States, and consequently there are very many stockholders in California corporations, who reside in other parts of the United States. All of them are seriously affected by the laws prevailing there, and will do well to familiarize themselves with the contents of this booklet, which is well written and accompanied with ample citations of authorities.

Moore on "Carriers." 2d ed. 3 vols. Buckram, Bible paper or regular paper, $19.50.

"Canadian Law of Simple Contracts." By W. Wyatt Paine. Cloth, $7; Half-calf, $8. (Canadian price.)

Chamberlayne's "Modern Law of Evidence." 4 vols. Bible paper edition, $30.

Burns' "Revised Statutes of Indiana." 5 vols. Buckram, $25; Sheep, $27.50.

Wait's "Law and Practice." 3 vols. Law buckram, $22.50.

"Warehouse Laws and Decisions." 2d ed. By Barry Mohun. $6.

"American Negligence Cases." Vol. 17. $6.50.

Mechem on "Agency." 2d ed. 2 vols. $15.

Recent Articles of Interest to Lawyers

Agriculture.

"Home on the Farm."—20 Case and Comment, 793.

Aliens.

"Will the California Alien Land Law Stand the Test of the 14th Amendment?"—23 Yale Law Journal, 330.

American Judicature Society.

"The American Judicature Society; An Interpretation." (Devoted exclusively to research and improvement in the administration of justice.)—62 University of Pennsylvania Law Review, 340.

Animals.

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Necessity of Study

Extensive reading is required to learn the law and keep informed of its frequent changes. Much study and reflection are necessary in planning for legal contests. These require seclusion and the shutting out of the diverting and enticing influences of society. The young man who has no taste for solitude and is unhappy when not enjoying the society of his fellows should not undertake the duties of this profession. In the country it may be easier to obtain and endure solitude, but in the cities the opportunities for entertainment and the allurements of pleasure are so numerous it is very difficult for one who craves such luxuries to suffer the self-denial.—Henry S. Wilcox.

Judges and Lawyers

A Record of Bench and Bar

Hon. Henry Clay Hall

Newly Appointed Member of the Interstate Commerce Commission

HENRY Clay Hall, who has been nominated by President Wilson to fill one of the vacancies existing on the Interstate Commerce Commission, is one of the ablest members of the Colorado bar and one of the most public spirited of its citizens. He has been a resident of Colorado Springs since 1892. Mr. Hall will be the first resident of the Rocky mountain region to serve on the Commission, and during the few weeks that his name has been under consideration, commercial and civic bodies and leading men throughout the West have joined in urging his candidacy. Mr. Hall is a native of New York state. He was graduated from Amherst College in 1881 and later from Columbia Law School, and was admitted to the New York bar in 1883. After practising law in New York for two years, he went to Paris, where he was assistant to Edmond Kelly, counsel at the American legation. In 1892 his health broke down, and he came to Colorado Springs to make his home. He has been engaged in the practice of law in Colorado Springs since 1893, and is considered one of the ablest attorneys in the West. He is a specialist on mining law and has made a thorough study of transportation problems.

HON. HENRY CLAY HALL

When Colorado Springs elected Mr. Hall mayor in 1905 on the Nonpartisan and Democratic ticket, it honored him in a way that no other man has ever been honored in that city, for he did not seek the office. At the time he was nominated, he was in New York city and he did not return until after the election. Before and after his term as mayor he has always taken an active part in civic affairs, and on many occasions has served his city in an efficient, public-spirited manner. He was a member of the charter commission which framed the charter under which Colorado Springs is now operating as a commission-governed city, and many of the most important chapters in this charter are the result of Mr. Hall's work.

He has been for many years an active

member in the Colorado Springs Chamber of Commerce, to which body he has rendered distinguished service. During the last year he has been a member of the board of directors and chairman of the municipal-affairs committee.

Mr. Hall was president of the Colorado Bar Association for the year 1911–12, and he has served on important committees of the American Bar Association.

In speaking of Mr. Hall recently, one of the Colorado Springs newspapers, of different political faith, termed him "the most useful citizen of Colorado Springs."

Mr. Hall will bring to his new position of honor and responsibility ability of the highest order, a thorough training in law, an intimate acquaintance with public affairs, fine ideals of public service, and an analytical mind, judicial temperament and executive grasp of affairs so essential to the performance of the duties of this Commission.

Death of John L. Cadwalader.

John Lambert Cadwalader, head of the law firm of Cadwalader, Wickersham & Taft, formerly Strong & Cadwalader, died recently at his home in New York City, after an illness of several weeks. Mr. Cadwalader was in his seventy-eighth year.

He was graduated from Princeton in 1856. He received his master's degree from Princeton in 1859 and in the following year was graduated from the Harvard law school. He immediately entered the practice of the law in New York.

In 1874 Mr. Cadwalader was appointed Assistant Secretary of State under the late Hamilton Fish in President Grant's second Administration and held the post until 1877. He returned to his law practice and never again held public office, although he was mentioned for many places of prominence.

On his return from Washington in 1878 Mr. Cadwalader and Charles E. Strong founded the law firm of Strong & Cadwalader. The firm kept this name until January 1 of the present year, when the name was changed to Cadwalader, Wickersham & Taft. The membership of the firm includes ex-Attorney-General George W. Wickersham and Henry W. Taft, brother of the former President.

Mr. Cadwalader had been president of the Bar Association of the City of New York and at the time of his death was president of the New York Public Library. He worked out the plans for combining the Astor, Lenox and Tilden Foundations in one great public library and was instrumental in putting the plan into execution. He also had much to do with the creation of the present library building at Fifth avenue and Forty-second street.

Princeton conferred the degree of LL. D. on Mr. Cadwalader in 1897. The University of Pennsylvania gave him the same degree in 1908.

Although doing a large amount of corporation practice Mr. Cadwalader did not specialize in that or any other one branch of the law, but always was known as a general practitioner.

Judge Simon Passes Away.

Judge Edward Simon, 90 years of age, distinguished scholar and jurist, graduate of Harvard, son of the late Edward Simon, justice of the Louisiana Supreme Court, and father of the present district judge, James Simon, died at his home in Martinville, La., on February 10. He practised law up to October, 1911, when his health failed. He was elected district judge before the Civil War, and served two terms.

Judge Simon received his primary education at Jefferson College, in St. James Parish, and from there went to Georgetown College, near Washington, and later graduated in law from Harvard. Judge Simon, at Harvard, studied under Greenleaf, Story and Longfellow. It was from the pupil Simon that the poet Longfellow obtained the description and topography of the Teche country to write his poem "Evangeline." The "Evangeline Oak," made famous in the poem, is still standing on the banks of Bayou Teche, in St. Martinville.

A few years after returning from Harvard he was elected district attorney. He was a member of the Constitutional Convention of 1879 as a delegate from St. Martin Parish, and took a prominent part in the framing of the organic laws of Louisiana.

James D. Maher

Clerk of the United States Supreme Court

JAMES D. Maher, appointed clerk of the Supreme Court of the United States, October 20, 1913, was born at West Point, New York, October 1, 1854. He removed to Washington in 1862, and was educated at public and private schools. He entered the service of the Supreme Court of the United States December 1, 1865, was appointed junior clerk in the office of the clerk June 1, 1872, and deputy clerk November 4, 1907. He has served under four of the nine chief justices and thirty-two of the fifty-nine associate justices of the court, and is the eighth clerk of the court appointed since its organization in 1790.

JAMES D. MAHER

He was appointed by the court the commissioner to take the testimony in the famous Chattanooga Contempt Case of the United States against Sheriff Shipp and others, and in the case of The People of New York v. The State of New Jersey and the Passaic Valley Sewerage Commissioners, in which latter case he has been taking testimony for the past two years.

He is a very popular official of the court, is known personally to every lawyer of note in the United States, and is regarded as an authority on Federal procedure.

The duties of the clerk of the court are varied and numerous, and have been increasing as the years roll by, until at the present time he is surrounded by a deputy clerk, four assistants, two stenographers, and two messengers. Among his most important duties are those of recording the minutes, judgments, orders, decrees, etc., of the court, and seeing that the docket is always up to date and correct, this latter duty being attended to every evening and necessitating at times his remaining in his office until 9 and 10 o'clock at night. He also has supervision of all printing for the court, which includes, with other things, the opinions handed down by the chief and associate justices. Although not required by law to do so, he keeps attorneys notified of the dates when their cases will be called before the court, and this entails a great amount of work owing to the wide jurisdiction of the court. The clerk also swears in all attorneys admitted to practise before the court, for which he receives a nominal fee. His salary, together with the fees received, makes his income compare favorably with that of other high officials of the government.

When Chief Justice White of the Supreme Court of the United States announced James D. Maher as the choice of the court for the position of clerk it marked only the eighth time during the one hundred and twenty-three years' existence of the court that a new clerk has been selected.

Who mix'd reason with pleasure, and wisdom with mirth.—Goldsmith.

Not What He Expected. He came into the police station, his hands clenched, and his eyebrows swooping downward towards the bridge of his nose.

"How much do you charge in a case of assault and battery?"

"That depends—about twenty shillings."

"You can knock the stuffing out of a man for that, can't you?"

"Possibly."

"Can a fellow pay his fine in advance?"

"If you want to," laughed the inspector.

The visitor laid two half-sovereigns on the desk.

"I'm going to lick a man, and I don't want any interference of the police while I do it." And he stalked out, muttering.

Half an hour afterwards a man came in. Both his eyes were puffed, his nose crooked, his clothing was hanging on him in rags.

"Well," he said, gently, "do you recognize me?"

"Can't say that I do."

"I'm the man who came in here half an hour ago and paid a fine in advance."

"Oh! Well, what do you want now?"

"Would you mind giving me 19s. 6d. back?"—Tit-Bits.

The Toot Code. Mayor Harrison, of Chicago, was being congratulated at a luncheon on his ordinance forbidding chauffeurs to blow their horns in the crowded business sections of the city.

"Chauffeurs think," he said, "that they need only blow their horns and the pedestrian will leap out of the way. Let the chauffeurs drive with care, remembering that the pedestrian's right is supreme.

"Why, if something isn't soon done, the chauffeurs, in their arrogance, will be getting up a horn Code for the pedestrian to learn and obey—a Code something like this:

"One toot.—Throw a quick back handspring for the sidewalk.

"Two toots.—Dive over the car.

"Three toots.—Lie down calmly; it is too late to escape; but we will go over you as easily as possible if you keep very still.

"One long and two short toots.—Throw yourself forward and we will save both your arms.

"One short and two long toots.—Throw yourself backward and one leg will be saved.

"Four toots—It's all up with you, but we promise to notify your family."—St. Louis Republic.

Between Scylla and Charybdis. A merchant conducted a little department store in a one-story building located between two immense department stores. This fellow did not believe in advertising. One Monday morning, when opening his store, he found the big store to his right had swung over its doors a huge sign, "Fire Sale—45 per cent off for cash," and the big store to the left had placed over its doors a large sign bearing the words, "Clearance Sale—50 per cent off for cash." Customers swarmed in and out of the two big stores all day long and they did a thriving business, while the poor little merchant made only a few scattering sales. He worried over the situation considerably that evening, and, the next morning, instead of going to his store, he went on a quiet hunt for an advertising sign painter, and before 10 o'clock he had over his door a huge sign which bore in letters of brilliant colors the words "Main Entrance." This sign, coupled with those of his neighbors, did

the business, and his sales for that day broke all records.

Judge's Stern Warning to Desperate Prisoner. There is a good story going around the capitol about Congressman Small, who hails from North Carolina. In prehistoric days, when Small was young in the law, he was prosecuting a town bully who bore a desperate character. This desperado was supposed to have added greatly to the population of the village cemetery and to be ready to kill his man at the drop of an acorn.

So, when Small stood him up at the bar before a country justice of the peace, the embryo congressman painted the prisoner in such dark colors that his own mother would never have recognized him at five paces. In the very height of his eloquence, Small pointed a long finger at the trembling man and shouted:

"Why, that man at the bar would just as soon kill me as not right here before your face, judge."

The judge leaned thoughtfully over, took off his specs, and glowered at the offending criminal.

"John Smith," he thundered, "if you dare kill Small here before me I will fine you a dollar and fifty cents for contempt of co'te; durn my soul, if I don't!" —Neb. Legal News.

A Flattering Defeat. The fashions are undeniably charming, and an episode in their honor was related the other day by Lieutenant Barnes at Annapolis.

"A very pretty girl," he said, "was motoring on a recent afternoon with a young man when, without a word of warning, he put his arms round her neck and kissed her.

"She was terribly enraged. She had the young man arrested. And she described angrily in court how he had gazed at her in silence, and then had seized and kissed her on the lips.

"The young man making no defense, the jury retired. A verdict of guilty was confidently expected. But, on the jury's return, the foreman asked permission to put two questions to the plaintiff.

"'Were you wearing, Miss'—so ran his first question—'were you wearing, when with this young man, that black velvet turban cocked over your left eye?'

"'Yes,' she answered, smiling.

"'And were you wearing,' the foreman pursued, 'that sable mantle with the Elizabethan ruff?'

"'Yes,' she said again.

"'Then,' said the foreman firmly, I have to announce that this jury acquits this defendant on the ground of emotional insanity.'"

The Irrelevant Eagle. "May it please the court," said a Yankee lawyer, before a Dutch justice who presided, "this is a case of great importance; while the American eagle, whose sleepless eye watches over the welfare of this mighty Republic, and whose wings extend from the Alleghenies to the Rocky chain of the West, was rejoicing in his pride of place—"

"Sthop dare! I say, vot has dis suit to do mit de eagles? Dis has notin' to do mit de wild bird. It is von sheep," exclaimed the judge.

"True, your Honor, but my client has rights."

"Your gliant has no right to de eagle."

"Of course not; but the laws of language—"

"What do I care for de laws of language, eh? I understand de laws of de state, and dat is enough for me. Confine your talk to de case."

"Well, then, my client, the defendant in this case, is charged with stealing a sheep, and—"

"Dat vill do! dat vill do! You gliant charge mit sthealing a sheep, just nine shillin'. De court vill adjourn."

Speaking Well of the Dead. Honorable Julian McCurry, of Georgia, division counsel of the Southern Railway Company, tells this one on an overzealous claimant whose scrub cow had been killed by a Southern train and immediately became fine "Jersey strain." The usual questions were presented to the owner of the cow to be answered. Among them was one that was kind of "proof of death" nature, to wit: The disposition of carcass?

Undaunted, the filer of the claim answered, "Kind and gentle."